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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIDWEST SOLVENT RECOVERY INC.;
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & E CORPORATION; ERNEST DE
HART; EDWARD D. CONLEY; HELGA C.
CONLEY; LOUIS DE HART; CHARLES A.
LICHT; DAVID E. LICHT; DELORES LICHT;
EUGENE KLISIAR; JEANETTE KLISIAR;
LUTHER G. BLOOMBERG; ROBERT J. DAW-
SON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
and DESOTO, INC.;

Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,

) Civil Action
) No. H-79-556
) Third-Party
) Complaint

90-17-1-1
DEPARTMENT OF JUSTICE

AUG 22 1990

LANDS DIVISION
ENFORCEMENT REC'D

1	AMERICAN PRINTER & LITHOGRAPHER CO.,)
	AMERICAN RIVET COMPANY, APECO,)
2	APPROVED INDUSTRIAL REMOVAL, INC.,)
	ARMOUR PHARMACEUTICAL, ARTISAN HAND)
3	PRINTS, ASPLAND CHEMICAL CO.,)
	AVENUE TOWING COMPANY, BARR &)
4	MILES, INC., BELDEN ELECTRICAL)
	PRODUCTS DIV. OF COOPER INDUSTRIES,)
5	INC., BRETFORD MANUFACTURING, INC.,)
	BUTLER SPECIALTY COMPANY, INC.,)
6	BY PRODUCTS MANAGEMENT, CALUMET)
	CONTAINER, CARGILL, INC.,)
7	CHEMALLOY DIVISION OF FISHER- CALO)
	CHEMICAL CO., CHICAGO ETCHING CORP.,)
8	CHICAGO NAMEPLATE COMPANY,)
	CHICAGO ROTOPRINT CO.,)
9	C & C INDUSTRIAL MAINTENANCE CORP.,)
	CITY OF GARY, INDIANA, C.P. CLARE)
10	DIVISION OF GENERAL INSTRUMENTS)
	CORP., C.P. HALL CO.,)
11	C.P. INORGANICS, COMMANDER PACKAGING,)
	CONNOR FOREST INDUSTRIES, CONSERVA-)
12	TION CHEMICAL, CONSUMERS PAINT)
	FACTORY, INC., CONTINENTAL)
13	WHITE CAP DIVISION OF CONTINENTAL)
	CAN COMPANY, CONVERSIONS BY GERPING,)
14	COUNTY OF DU PAGE, ILLINOIS,)
	CRONANE, INC., CROWN CORK & SEAL)
15	CO., INC., CULLIGAN INTERNATIONAL)
	COMPANY, CULLIGAN WATER CON-)
16	DITIONING, INC., FRANK J. CORRAN,)
	CUSTOM METALS PROCESSING,)
17	DAP, INC. OF BEECHAM COSMETICS,)
	DAUBERT CHEMICAL COMPANY,)
18	DEUBLIN COMPANY, DOBSON CONSTRUCTION)
	INC., DUO FAST CORPORATION, DU-TONE)
19	CORP., HAROLD EGAN, FEKO HOUSEWARE)
	CO., EL-PAC, INC., EMROSOGRAPH DIS-)
20	PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
	ETHICON, INC., FELT PRODUCTS MFG. CO.,)
21	FLINT INK CORP., FURNAS ELECTRIC)
	CO., GEARMASTER DIVISION, EMERSON)
22	ELECTRIC, THE GILBERT & BENNETT)
	MFG. CO., GLD LIQUID DISPOSAL,)
23	HENRY PRATT COMPANY, J.M. HUBER)
	CORPORATION, HYDRITE CHEMICAL CO.,)
24	INTAGLIO CYLINDER SERVICE, INC.,)

1 JOHNSON & JOHNSON, T & S TIN MILL)
 PRODUCTS, KNAACK MFG. CO., LANSING)
 2 SERVICE CORPORATION, LAUTTER)
 CHEMICAL, LIQUID DYNAMICS,)
 3 LIQUID WASTE, INCORPORATED,)
 STEVE MARTEL, MASONITE CORPO-)
 4 RATION, MCWHARTER CHEMICAL CO.,)
 METAL RECLAIMING CORPORATION,)
 5 METROPOLITAN CIRCUITS,)
 MIDWEST RECYCLING COMPANY, MONTGOMERY)
 6 TANK LINE, MORTON THIOKOL INC.,)
 MR. FRANK, INC., NAMSCO, INC.,)
 7 NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
 NUCLEAR DATA, INC., PPG INDUSTRIES,)
 8 INC., PASLODE COMPANY, PIERCE & STEVENS)
 CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
 9 PREMIER PAINT CO., PYLE-NATIONAL CO.,)
 R-LITE, REFLECTOR HARDWARE CORP.,)
 10 REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
 RICHARDSON GRAPHICS, JOHN ROSCO,)
 11 ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
 MANUFACTURING, SCHOLLE CORPORATION,)
 12 SCRAP HAULERS, SHERWIN WILLIAMS)
 COMPANY, SIELD COATINGS, INC.,)
 13 SIZE CONTROL COMPANY, SKIL CORPORA-)
 TION, SPECIAL COATINGS CO.,)
 14 SOUTHERN CALIFORNIA CHEMICAL,)
 SPECIALTY COATINGS, INC.,)
 15 SPOTNAILS, INC., STAR TRUCKING, STERN)
 ELECTRONICS, INC., JOE STRAUSNICK,)
 16 STUART CHEMICAL & PLANT, INC.,)
 SUMNER & MACE, SUN CHEMICAL,)
 17 SYNTech WASTE TREATMENT CENTER,)
 T.R.C., TREPAC, INC., ALFRED TENNY,)
 18 THIELE-ENGDAHL, INC., THOMPSON)
 CHEMICALS, TIFPT CHEMICALS,)
 19 TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
 UNIROYAL, INC., UNITED RESIN AD-)
 20 HESIVES, INC., U.S. ENVELOPE, U.S.)
 SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
 21 VERSAL RESEARCH LABORATORIES, INC.,)
 UNIVERSAL TOOL & STAMPING COMPANY,)
 22 VANDER MOULEN DISPOSAL, VELSICOL)
 CHEMICAL CORP., VICTOR GASKET)
 23 DIVISION OF DANA CORPORATION,)
 WARNER ELECTRIC BRAKE & CLUCH CO.,)
 24 WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)

3 Third-Party Defendants.)
4
5
6
7

8 DEPOSITION OF RICHARD F. ROICE
9

9 August 2, 1990
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6 The continued deposition of RICHARD
7 ERWIN NOICE, called for examination by the
8 Defendants, pursuant to notice and pursuant
9 to the provisions of the Federal Rules of
10 Civil Procedure of the United States
11 District Courts, pertaining to the taking
12 of depositions for the purpose of
13 discovery, taken before Arnold N.
14 Goldstine, a Notary Public and Certified
15 Shorthand Reporter within and for the
16 County of Cook and State of Illinois, at
17 227 West Monroe Street, on August 2, 1990,
18 commencing at the hour of 9:00 o'clock p.m.
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APPEARANCES:

Mr. Alan S. Tenenbaum and
Mr. Leonard M. Gelman
Trial Attorney
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Land & Natural Resources Division
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-and-

Mr. Michael R. Berman
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-and-

Peter W. Moore
Assistant Regional Counsel
U.S. Environmental Protection Agency
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230 South Dearborn Street
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appeared on behalf of Plaintiff,
United States of America;

1 **APPEARANCES (CONTINUED):**

2
3 Mr. Robert M. Olian
4 Wildman, Harrold, Allen & Dixon
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6 Chicago, Illinois 60606-1229

7 appeared on behalf of
8 Penn Central Corporation;

9 Mr. William G. Dickett
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11 One First National Plaza
12 Chicago, Illinois 60603

13 appeared on behalf of
14 Pre Finish Metals, Inc.;

15 Mr. Carl R. Hillemann
16 Sonnenschein Nath & Rosenthal
17 One Mercantile Center
18 Suite 2600
19 St. Louis, Missouri 63101

20 appeared on behalf of
21 Desoto, Inc.;

22 Mr. Joseph V. Karaganis
23 Karaganis & White, Ltd.
24 414 North Orleans Street
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 appeared on behalf of
 American Can Company, Inc.;

1 **APPEARANCES (CONTINUED):**

2
3 Mr. James T. J. Keating
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5 Printers Row
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8 appeared on behalf of
9 Premier Coatings, Inc.;

10 Mr. Edward J. Leahy
11 Leahy, Eisenberg & Fraenkel, Ltd.
12 309 West Washington Street
13 Chicago, Illinois 60606

14 appeared on behalf of
15 Scholle Corp.;

16 Mr. David S. Finch
17 McDermott, Will & Emery
18 227 West Monroe Street
19 Chicago, Illinois 60606-5096

20 Mr. Richard S. VanRheenen
21 Cromer, Raglesfield & Maher, P.A.
22 Station Place
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24 Indianapolis, Indiana 46225

 appeared on behalf of
 J & S Tin Mill Products Company,
 Inc., et al.;

1 **APPEARANCES (CONTINUED):**

2
3 Mr. Ralph W.P. Lustgarten
4 Taylor, Miller, Sprowl, Hoffnagle &
5 Merletti
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8
9 appeared on behalf of Third-
10 Party Plaintiffs Desoto, et al.;

11
12 Ms. Carol Dorge and
13 Mr. Brent Clark
14 Seyfarth, Shaw, Fairweather & Geraldson
15 55 East Monroe Street
16 42nd Floor
17 Chicago, Illinois 60603

18 appeared on behalf of
19 Motorola, Inc.

I N D E X

WITNESS:

RICHARD E. BOICE

Direct Examination

By Ms. Dorge: 1655

By Mr. Karaganis: 1732

Continued: 1836

E X H I B I T S

Boice Deposition Nos.

53 1655

1 RICHARD EDWIN BOICE,
2 having been previously duly sworn,
3 was examined and testified further as follows:

4 DIRECT EXAMINATION

5 BY MS. DORGE:

6 Q. Good morning, Mr. Boice. My name is
7 Carol Dorge, I am an attorney representing
8 Motorola, Inc.

9 We are here today pursuant to a Rule 30
10 (b) 6 notice of the United States. I am going
11 to ask to have this marked as an exhibit. I
12 will ask you to look at it.

13 (The document above-referred to
14 was marked Boice Deposition
15 Exhibit No. 53 for identification.)

16 I am handing you what is marked as
17 Exhibit 53 and ask if you understand that you
18 are here today as the representative of the
19 United States pursuant to that deposition
20 notice?

21 MR. TENENBAUM: Let me for the record state
22 what the United States' response to this notice
23 would be in the way of objection.

24 We will incorporate our previous

1 objections that I think are already an exhibit
2 to this deposition to these type of Rule 30 (b)
3 6 notice requests.

4 In particular I refer to the objections
5 we filed to the American Can and Desoto and
6 Insilco request for discovery on
7 liability-related issues, where such information
8 was derived through the information obtained
9 during the course of this litigation or other
10 information obtained from third parties.

11 I will let those objections speak for
12 themselves, but I will note for the record that
13 some of the material developed is attorney work
14 product.

15 And, in addition, I would note for the
16 record that it is my understanding that Motorola
17 has declined to produce any witnesses who can
18 testify in response to the United States Rule 30
19 (b) 6 deposition notices that were able to
20 testify to information that is obtained from
21 third parties.

22 MS. DORGE: I object to your
23 characterization.

24 Motorola stipulated that it was ready

1 to produce a witness and stipulated to the fact
2 that that witness would testify to --

3 MR. TENENBAUM: Not on issues relating to
4 third-party information and documents.

5 MR. LUSTGARTEN: What is the third-party
6 information?

7 MR. TENENBAUM: By third-party information,
8 I am talking about information such as testimony
9 of truck drivers, Midco log, invoices and so on
10 that were not prepared by the Agency.

11 And my understanding is that Motorola
12 declined to produce anyone on those subjects on
13 the ground that it did not have any knowledge of
14 that.

15 Let me go through the request 1 through
16 6.

17 Matter for examination number 1 is
18 similar to requests made by American Can, Desoto
19 and Insilco, and I will incorporate the
20 objections I have just referred to.

21 In addition, to the extent you are
22 seeking expert testimony, Mr. Boice I don't
23 believe -- this is not a proper expert
24 deposition notice and we would object to any

1 questions that seek expert testimony as to the
2 hazardous nature of substances and so on.

3 MS. DORGE: Do you intend to present Mr.
4 Boice as an expert on this subject?

5 MR. TENENBAUM: I am not -- I am saying that
6 we already have designated an expert on that
7 subject, that is Mr. Meyer.

8 Category number 2, the physical and
9 chemical characteristics, et cetera of
10 Motorola's waste materials. That would be
11 information within Motorola's knowledge. We
12 would not have a witness who would have
13 firsthand knowledge of that.

14 And Motorola, as I understand it, has
15 declined to produce witnesses and claiming they
16 don't have firsthand knowledge.

17 Indeed, I would point out that Motorola
18 has declined to produce witnesses on subjects
19 like this on the ground that none of its current
20 employees have knowledge of this, even though
21 its former employees may have knowledge of this
22 information.

23 So it is a little bit one-sided for
24 Motorola to suggest that when they are not

1 producing a witness as to their own operations
2 and their own characteristics of their own waste
3 materials, that EPA should produce a witness to
4 testify as to characteristics of their own
5 materials that they are refusing to produce a
6 witness on who has any knowledge of it, at least
7 thus far.

8 MS. DORGE: Will you stipulate at this point
9 that the United States has no firsthand
10 knowledge of the nature of Motorola's waste
11 material?

12 MR. TENENBAUM: I am not stipulating as
13 to -- I am not sure what you mean by that.

14 But, I am indicating that to the extent
15 that you are seeking expert testimony on the
16 characteristics of specific materials, again Mr.
17 Meyer cannot testify as an expert witness.

18 I can't enter into any stipulation here
19 because I am not sure what exactly -- I used
20 firsthand knowledge as a shorthand form and it
21 would have to be more precise before I could
22 engage in entering into a stipulation like that.

23 Of course, if we are going to talk
24 about stipulations in these areas, we would want

1 a stipulation from Motorola that corresponded to
2 what they knew and so on. We will be glad to
3 discuss that with you after the deposition.

4 Item 4 would be similar to item 3 as it
5 gets into the physical and chemical
6 characteristics of Motorola's operation, waste
7 materials, and so on. That would be similar to
8 number 3.

9 As would number 5 be similar to 3 and
10 4. Again, we will designate Mr. Boice to
11 testify in general as we did with respect to the
12 notices of American Can Desoto and Insilco and
13 anyone else on liability issues, to the extent
14 of providing you with a general description of
15 the basis for the allegations in the United
16 States' complaint that Motorola arranged for the
17 disposal of hazardous substances to the Midco I
18 and Midco II sites.

19 We will designate Mr. Boice to testify
20 as to that in general. Although, that is
21 subject to our objection and it is particularly
22 a strong objection here, when Motorola has
23 itself declined to produce anyone who could
24 testify as to the basis for its denial of these

1 allegations.

2 MS. DORGE: I want to express a continuing
3 objection to your characterization of what
4 Motorola has produced or declined to produce as
5 a witness. And by my silence, I don't want to
6 imply that I am agreeing with any of your
7 characterizations.

8 MR. TENENBAUM: That is fine. We don't have
9 to debate that.

10 Again, items 6 would be similar to item
11 1. To the extent you are seeking expert
12 testimony on the nature of substances, Mr. Meyer
13 can testify as to that.

14 To the extent you are seeking to find
15 out what information the Agency has developed
16 during the course of this litigation and during
17 the course of the Midco investigation, that
18 would in part be attorney work product and in
19 part would be the result of information obtained
20 from third parties, that you are free to --

21 We have already produced documents to
22 you, and you have the deposition transcript
23 yourself. You are free to review them.

24 Again, as I said earlier, we will allow

1 Mr. Boice to testify in general as to the basis
2 for allegations in the United States complaint
3 to the extent that that is related to 6, if it
4 is.

5 BY MS. DORGE:

6 Q. Mr. Boice, are there any people,
7 individuals at EPA who have knowledge of wastes
8 that would have been generated by Motorola
9 during the relevant time period as I understand
10 it '74 to 1980?

11 MR. TENENBAUM: When you say knowledge, do
12 you mean their own observation?

13 MS. DORGE: Yes.

14 A. You mean who directly were there during
15 the disposal operation?

16 Q. Who have any firsthand knowledge of the
17 nature of waste or quantities of waste that
18 would have been shipped to Midco?

19 A. By firsthand knowledge, you mean
20 someone who was actually there and counted the
21 drums coming into Midco and identified them as
22 Motorola?

23 Q. We will start with that.

24 A. As far as I know, we don't have anyone

1 like that.

2 Q. Do you know of anyone who observed any
3 Motorola drums at Midco or Motorola waste being
4 disposed of at Midco?

5 MR. TENENBAUM: Anyone at EPA?

6 BY MS. DORGE:

7 Q. Do you know of anyone?

8 A. You were talking about EPA before.

9 Q. Anyone.

10 MR. TENENBAUM: Anyone whether or not at
11 EPA. Okay, go ahead.

12 A. Yes.

13 BY MS. DORGE:

14 Q. Who would that be?

15 A. Well, the information is available in
16 depositional transcripts. But my understanding
17 is that Marin Dale Robinson, Charles Licht,
18 Ernest Dehart, Ron Crouch, and there were some
19 other people.

20 Q. Who were the other people?

21 A. I don't know.

22 Q. Were they all employees of --

23 A. I would have to look it up.

24 Q. -- of owners of the site?

1 Where would you look that up?

2 A. In the depositional transcripts.

3 I am not sure whether someone like
4 Richard Cleaton would have that knowledge or
5 not.

6 Q. Do any contractors of RPA have that
7 sort of knowledge, past contractors?

8 MR. TENENBAUM: You are talking here about
9 firsthand personal observations?

10 MS. DORGE: Of Motorola's waste being at the
11 site.

12 A. I'm not sure.

13 Q. When you refer to the depositions. Are
14 these depositions all identified in the
15 administrative record?

16 A. No.

17 Q. Are they all depositions that have been
18 taken within the course of this litigation?

19 A. As far as I know, they are.

20 Q. So they would be part of the record in
21 the litigation?

22 A. I don't know how it works. I presume
23 they are filed in court.

24 Q. They would they would all be marked,

1 identified as depositions taken in this
2 litigation by notice pursuant to this
3 litigation?

4 A. As I said before, I don't know exactly
5 how that works. But, I presume there is some
6 type of record at the court.

7 Q. What facts form the basis for EPA's
8 allegation that Motorola disposed of waste at
9 the Midco site?

10 MR. TENENBAUM: Same continuing objection.

11 A. Okay.

12 Our -- what was the question again,
13 what forms the basis?

14 BY MS. DORGE:

15 Q. What acts form the basis for EPA's
16 allegation?

17 A. Our facts are based on documents we
18 have, including documents received from Dehart
19 and Intec, which includes shipping documents,
20 check receipts, notes, the Midco log and other
21 business records.

22 It includes your response to production
23 of documents. Your response, Motorola's
24 response to our 104 E request, Motorola's

1 response to our interrogatories. Permit and
2 permit applications that are available.

3 Q. Which permits or permit applications
4 are you referring to?

5 MR. TENENBAUM: I again have to object to
6 this line of questioning.

7 A. I wasn't finished yet.

8 MR. TENENBAUM: Do you want him to break off
9 his answer?

10 BY MS. DORGE:

11 Q. Why don't you go ahead and finish
12 listing the documents, then we will go back.

13 A. Okay. Depositions.

14 Q. These are the same depositions you
15 already discussed?

16 A. Yes. Interviews, and testimony in
17 court.

18 Q. You referred to documents received from
19 Dehart, Intec, notes, Midco log and other
20 business records.

21 Are these all documents that have been
22 produced in this litigation, either attached to
23 the United States' request for admission or
24 otherwise provided to Motorola?

1 A. You mean the Dehart and Intec
2 documents?

3 Q. Yes.

4 A. As far as I know, they have all been
5 produced, yes.

6 Q. Has the permit or permit applications
7 been provided to Motorola?

8 A. I don't know.

9 Q. Is the permit that you are referring to
10 the Part A permit under RCRA?

11 A. That is what I understand, I'm not
12 sure.

13 MR. TENENBAUM: I have to object to this
14 line of questioning as seeking to probe the
15 attorney work product of the United States in
16 this litigation.

17 If there are any, these are Motorola's
18 own permit applications. If you don't have
19 them, I don't know who would.

20 If you want us to go through and search
21 for them.

22 MS. DORGE: We are trying to determine what
23 facts EPA relied on in support of the
24 allegation.

1 I am not trying to delve into attorney
2 work product privilege areas. But, to the
3 extent you relied on certain documents,
4 certainly a permit application is not a
5 privileged document. That is what I am trying
6 to find out.

7 MR. TENENBAUM: They are Motorola's own
8 permit applications. You must have your own
9 permit applications.

10 BY MS. DORGE:

11 O. Are there any other permits other than
12 Motorola's Part A RCRA permit application that
13 EPA relied on?

14 MR. TENENBAUM: Again, if you know.

15 This witness may or may not know that.
16 He is not an attorney handling this case.

17 He has indicated that part of the basis
18 of the United States' allegations is the permit
19 applications, and in general that may or may not
20 exhaust his knowledge on that.

21 I will let him say whatever he knows.
22 But, I will have to again object on the grounds
23 that you are seeking to probe the United States'
24 attorney work product in this litigation.

1 If you are having trouble locating
2 Motorola's permit applications, which I would
3 note by the way we have ourselves requested from
4 Motorola. So if you have produced them, you
5 obviously must have them, if you have given them
6 to us.

7 If you haven't produced them to us,
8 then I would ask you why haven't you produced
9 them to us.

10 These are things we requested from you.
11 We requested all permit applications back in
12 1985. I am not sure that you produced any of
13 them. We may have found one or more on our own.

14 But, I would ask you why have you not
15 produced them to us, and why are you now asking
16 us to tell you what you haven't produced?

17 MS. DORGE: Well let -- this is not the
18 proper forum to discuss Motorola's response to
19 government discovery requests. But let me
20 rephrase the question.

21 Q. Are you relying on any permits for the
22 1974 to 1980 time period other than the Part A
23 permit application?

24 MR. TENENBAUM: If you know.

1 Again, I have to object. There is no
2 foundation that this witness would know this
3 information and we are well beyond the general
4 basis for the United States' allegations and we
5 are now into attorney work product.

6 If you know, you can answer.

7 A. I don't know. I would have to look
8 through all the files. Also we are continuing
9 discovery in this matter.

10 BY MS. DORGE:

11 Q. Did you review any documents in
12 preparing for this deposition?

13 A. No.

14 Q. Are there any other facts that support
15 the United States' allegation that Motorola
16 allegedly arranged for disposal of wastes at the
17 Midco sites?

18 A. Well, as far as I know, all the facts
19 we are aware of are contained in these
20 documents.

21 Q. Could you explain how these documents,
22 the facts contained in those documents,
23 demonstrate that Motorola arranged for disposal
24 at the site as opposed to treatment or disposal

1 at another site?

2 Is Midco the only site that was used by
3 Midwest solvents?

4 MR. TENENBAUM: I have to object to that
5 question. How would this witness know what
6 Midwest Solvents -- if they used this site.

7 BY MS. DORGE:

8 Q. Is your allegation based on any facts
9 other than the identification of Midco as a
10 designation site on the documents?

11 A. Yes. We also have --

12 Q. Or Intec?

13 When I refer to Midco, I am referring
14 to any --

15 MR. TENENBAUM: She wants to know whether
16 you are just relying on documents.

17 A. No.

18 We have depositions that indicate that
19 Motorola's wastes were directly dumped on the
20 both Midco I and Midco II.

21 BY MS. DORGE:

22 Q. Has EPA determined whether Motorola's
23 waste was processed at Midco or processed
24 somewhere else?

1 A. I don't know what you mean by process.

2 Q. What facts do you have that support
3 your allegation that the waste was disposed
4 of --

5 MR. TENENBAUM: Hold it a second. That is
6 not a correct statement of our allegation.

7 Our allegation is that Motorola
8 disposed of or arranged for the treatment or
9 disposal of hazardous substances, at least as we
10 stated here. I assume you have restated it
11 accurately.

12 MS. DORGE: Okay.

13 Q. Has EPA excluded the possibility that
14 any waste hauled by Midco would not have gone to
15 another site?

16 Are there any facts --

17 A. I don't understand your question.

18 Q. Are there any facts that demonstrate
19 that the waste hauled remained at the Midco
20 sites other than --

21 MR. TENENBAUM: Waste?

22 MS. DORGE: Hauled by Midco, the Midco
23 group.

24 MR. TENENBAUM: I am going to have to assert

1 the same continuing objection.

2 Rather than debating this in a legal
3 brief as to what the evidence shows from these
4 depositions, you want to have an EPA witness
5 interpret the deposition testimony of these
6 employees.

7 I don't think that is fair.

8 BY MS. DORGE:

9 Q. Are there facts other than the
10 deposition testimony in EPA's possession that
11 exclude the possibility that Motorola's waste
12 was taken to another site?

13 A. Well, there is an interview, I am not
14 sure whether that addresses that or not. Court
15 transcripts.

16 Q. You referred to court transcripts.
17 Could you explain what you are
18 referring to?

19 A. Testimony in court.

20 Q. In which proceeding?

21 A. I don't know. I just know they have
22 some that might contain some information on
23 that.

24 Q. Do you recall who was testifying?

1 A. I just told you. All I know is that
2 they have court transcripts and it may contain
3 information relevant to that.

4 Q. Are these in the administrative record?

5 A. No. They are in the court records.

6 Q. You don't know whether it is this
7 proceeding or another proceeding?

8 A. It would be related to the Midco
9 proceeding.

10 Q. Are there any other facts?

11 MR. TENENBAUM: Any other facts of what?

12 A. I would have to review your response to
13 our 104 E request. And our -- your response to
14 our request for admissions. Your response to
15 our request for production of documents.

16 BY MS. DORGE:

17 Q. Is there any other --

18 A. Then you ruled out, you are saying
19 other than the Dehart and Intec documents,
20 right, and the depositions?

21 You said other than the depositions.
22 Well, there is the Dehart and Intec documents
23 that identify that wastes were picked up from
24 Motorola, and on these documents that I don't

1 know all of them, but there was pickup tickets
2 and there's receipts and other types of business
3 documents. Midco log.

4 Q. Anything else?

5 MR. TENENBAUM: Same continuing objection.

6 A. That is all I can think of right now.

7 BY MS. DORGE:

8 Q. Okay.

9 What is the basis for your allegation
10 that Motorola disposed of waste at Midco I as
11 opposed to Midco II?

12 And the same question as far as Midco
13 II is concerned.

14 MR. TENENBAUM: Same continuing objection.

15 A. Well, we know from the history of the
16 site, that prior to the Midco I fire in December
17 1976, that the Midco I site was the focal point
18 of the operations.

19 Although, we do know that during a
20 certain period of time they started taking
21 wastes to Midco II and storing them there and
22 possibly disposing of them there. I have to
23 look at the depositions to find out. And then
24 after Midco.

1 So we have shipping documents
2 identifying shipments to the Midco sites from
3 Motorola during that period of time prior to
4 December 1976. I think those are based on the
5 Midco log. After December 1976, we know from
6 the site's history that the operations moved to
7 Midco II.

8 Q. Was there any disposal at Midco I after
9 December of 1976?

10 MR. TENENBAUM: Same continuing objection.

11 These depositions speak for themselves.
12 I don't see why we need to have Mr. Boice
13 interpret the depositions for you.

14 Will you produce a Motorola witness to
15 testify for us?

16 BY MS. DORGE:

17 Q. Is your testimony based on --

18 MR. TENENBAUM: Hold it a second. Can you
19 answer my question?

20 Just two weeks or three weeks ago I put
21 in a notice of deposition under Rule 30 (b) 6
22 and the last category in that notice asked for
23 the basis for any denial by Motorola as to
24 whether or not Motorola's wastes ended up at

1 Midco I and Midco II.

2 And you produced no witness at that
3 deposition.

4 Are you willing now to produce a
5 witness for us, now that you are asking the same
6 types of questions of Mr. Boice?

7 MS. DORGE: This is the lawsuit brought by
8 the United States.

9 MR. TENENBAUM: You denied it in your
10 answer, didn't you?

11 What was the basis for the denial in
12 your answer?

13 MS. DORGE: Our denial was in part based on
14 the fact that we had no knowledge.

15 MR. TENENBAUM: I don't know that your
16 answer says that, does it?

17 Does your answer say that it was
18 because you had no knowledge?

19 MS. DORGE: I don't see this discussion is
20 appropriate here. I would like to continue the
21 deposition.

22 MR. TENENBAUM: I am afraid that it is
23 appropriate. Because the reason that it is, is
24 you are taking highly inconsistent positions.

1 Here we have produced a witness to
2 testify in general on this, subject to our
3 objections.

4 You produced on the exact same issue no
5 witness for us as to whether things went to
6 Midco I and Midco II.

7 And then you are now asking this
8 witness detailed questions to interpret the
9 deposition testimony of the truck drivers, et
10 cetera.

11 Are you willing -- I need to ask you.
12 Are you willing or not to produce a Motorola
13 witness who will give us your interpretation of
14 these documents?

15 If you are not willing to produce a
16 witness to us who will interpret these
17 depositions and other documents, why should we
18 have to interpret the depositions? That is a
19 highly irregular practice.

20 MS. DORGE: I am not asking the witness to
21 interpret the deposition.

22 If that is his answer, if his answer is
23 that he would refer to those depositions and not
24 rely on other independent information, that is

1 fine.

2 Q. Is that your answer?

3 MR. TENENBAUM: Well, depositions and all
4 the other things he has listed.

5 MS. DORGE: Right. The documents that he
6 has listed.

7 A. Yes.

8 We are primarily relying on the
9 depositions for the sites' history. Although,
10 there seems to -- the sites' histories are also
11 in a number of other reports and so forth. I
12 don't know where all that came from.

13 But, anyway, it is based on the sites'
14 history and the shipping documents and also the
15 depositional testimony that certain wastes from
16 Motorola were dumped on both Midco I and Midco
17 II.

18 Q. Just so the record is clear, other than
19 these documents that you have referred to, EPA
20 has no information as to when Midco I was used
21 as opposed to Midco II?

22 MR. TENENBAUM: Other than the documents and
23 depositions?

24 A. I guess we also have newspaper

1 articles, fire reports from the City of Gary.
2 We might have that, I'm not sure.

3 MR. TENENBAUM: Are you including whatever
4 we produced in this case previously to Motorola
5 back in '84 and '85, which I think was one of
6 these categories of documents, correct?

7 BY MS. DORGE:

8 Q. Let me show you what has been marked
9 as --

10 A. Possibly inspection reports produced by
11 people who were involved with inspecting the
12 sites at that time.

13 Q. Could you read the last answer.

14 (The record was read.)

15 I am handing you what has previously
16 been marked as Boice Deposition Exhibit 27,
17 which is, do you understand that to be the Midco
18 log?

19 MR. TENENBAUM: You are not asking for his
20 firsthand knowledge, are you?

21 MS. DORGE: He has no firsthand knowledge.

22 MR. TENENBAUM: I am afraid I will have to
23 object on the grounds your question is
24 ambiguous.

1 MS. DORGE: He has referred to the Midco log
2 in the documents that the government has relied
3 on. I have a right to ask him whether that's
4 the document that he is referring to.

5 MR. TENENBAUM: You could ask him whether
6 that looks like the exhibit. Being that he
7 didn't prepare the document, I am not sure he is
8 able to authenticate it.

9 MS. DORGE: That's fine.

10 A. It appears to be a photocopy of the
11 Midco log.

12 Q. Is there any information in that
13 document that supports an allegation that
14 Motorola disposed of waste at Midco at any time?

15 MR. TENENBAUM: Again I have to object.

16 You are requesting the witness to
17 interpret the document, that other witnesses who
18 have prepared the document have already
19 testified at length about. I don't think it is
20 appropriate.

21 And I am going to ask whether Motorola
22 is willing to produce a witness who is willing
23 to testify as to the contents of the Midco log?

24 Are you willing produce a Motorola

1 employee to testify as to the contents of the
2 log?

3 MS. DORGE: I don't think that requires a
4 response.

5 MR. TENENBAUM: No response.

6 Then I am going to strenuously object
7 to the question and I think it is entirely
8 improper.

9 I think that the log speaks for itself.
10 I don't know how this witness --

11 To the extent it doesn't speak for
12 itself, this witness is certainly not the person
13 who is able to testify as to what the meaning of
14 it is. Wouldn't you agree?

15 MS. DORGE: The witness has testified that
16 this document is one of the documents that he
17 relied on in support of the allegation that
18 Motorola disposed of waste.

19 I am asking what it is in this document
20 that he relied on.

21 MR. TENENBAUM: I think what the witness
22 said was that this document was relied on with
23 respect to the allegations of 29 and 39 in the
24 complaint.

1 Whether every single document he listed
2 applies to Motorola as opposed to other
3 defendants is a separate question.

4 I would object to the process as well
5 of having this witness, who did not prepare this
6 document, reviewing a 20- or 25-page document
7 looking for the name Motorola, when -- in this
8 deposition. It is highly inappropriate.

9 And, again, I would ask whether or not
10 Motorola will be producing a witness to go
11 through this same futile exercise, given that
12 the truck drivers and everyone else have already
13 testified as to the contents of these documents.

14 (Discussion had off the record.)

15 MR. TENENBAUM: Back on the record for a
16 second.

17 Just so the record is clear, this
18 exhibit which is called Boice Exhibit 27 may or
19 may not be the full and accurate copy of the
20 Midco log.

21 The full and accurate copy has been
22 identified and authenticated at the depositions
23 of Mr. Crouch and Mr. Dehart.

24 MR. KEATING: It should be outside in the

1 box, isn't it? The boxes are all outside the
2 door.

3 MR. TENENBAUM: In any event, whatever else
4 is here, the Midco log was identified and
5 authenticated at the Crouch and Dehart
6 depositions. Whether or not this is the same
7 document.

8 MR. KARAGANIS: Which Crouch and Dehart
9 depositions?

10 MR. TENENBAUM: The ones that took place in
11 1990.

12 MR. KARAGANIS: What exhibit?

13 MR. TENENBAUM: I couldn't tell you offhand.
14 And whether or not this is the same as what they
15 identified and authenticated is something that I
16 am not in a position to tell you at this time,
17 and I would ask that you use those for any
18 further questions.

19 A. All I can say is I don't see the name
20 Motorola on this document.

21 BY MS. DORGE:

22 Q. I am handing you what has previously
23 been marked Exhibit 28 to the Boice deposition
24 and ask whether there are any facts in that

1 document relied on in support of your
2 allegations against Motorola?

3 A. All I can say is I don't see the name
4 Motorola mentioned in this particular document.

5 Q.

6 MS. FULLEN: For the record could you
7 identify what that document is?

8 MS. DORGE: I understand that to be a write
9 up of the Crouch interview.

10 A. Yes.

11 MR. TENENBAUM: Deposition Exhibit 28.
12 Boice Deposition Exhibit 28.

13 BY MS. DORGE:

14 Q. Let me move on.

15 Mr. Boice, what hazardous substances
16 does EPA allege were disposed of by Motorola at
17 the Midco sites?

18 MR. TENENBAUM: Same continuing objection.

19 A. It would be the any hazardous
20 substances identified on the documents I have
21 already listed.

22 BY MS. DORGE:

23 Q. What hazardous substances are
24 identified on those documents?

1 A. I would have to see the permit and
2 other documents that relate to Motorola to
3 answer that question.

4 Q. Which documents would you review?

5 A. I would review the permit application.

6 Q. I can show you these documents.

7 I understand the permit application to
8 be the part a RCRA permit application?

9 A. I'm not sure.

10 MR. TENENBAUM: Again we object to this line
11 of questioning, as previously.

12 A. I haven't looked at all the documents.

13 BY MS. DORGE:

14 Q. What else would you review?

15 A. I would review Motorola's response to
16 our 104 B request. The Dehart and Intec
17 documents. The response to our request for
18 admission. Response to our request for
19 production of documents. The depositions. The
20 interviews, any interviews that were in the
21 court transcripts.

22 Q. Does EPA have any independent facts
23 apart from the language reflected on those
24 documents that interpret that language or

1 otherwise explain what was meant by any
2 statement on those documents?

3 MR. TENENBAUM: I have to object to that
4 question.

5 The United States is conducting a
6 continuing investigation as to the nature of
7 Motorola's waste materials.

8 We have taken Motorola's deposition.
9 And Motorola produced a witness who didn't have
10 any knowledge, and is producing another witness
11 I understand in a couple weeks.

12 We are conducting, our own attorney
13 work product investigations are ongoing, and we
14 have Mr. Meyer who will be providing expert
15 testimony.

16 And I think that your question is both
17 premature as well as --

18 MS. DORGE: I am not --

19 MR. TENENBAUM: -- as well as objectionable
20 on all the other grounds that I have listed
21 before.

22 MS. DORGE: I am not asking for anything
23 subject to attorney work product privilege.

24 I am not asking EPA to interpret what

1 Motorola's witnesses would say. I am not asking
2 for expert testimony.

3 Q. But, let me ask more simply.

4 To the extent a document says a
5 material is corrosive, does EPA have any facts
6 that explain what was meant by that
7 characterization?

8 MR. TENENBAUM: To the extent that one,
9 whose documents?

10 MS. DORGE: One of the documents that he has
11 referenced might say corrosive, does EPA have
12 any information that would explain facts that
13 would explain if that corrosive material was a
14 hazardous substance?

15 MR. TENENBAUM: Now you are seeking expert
16 testimony as to what is a hazardous substance.

17 MS. DORGE: Okay.

18 Q. Are there any facts about what the
19 waste was?

20 MR. TENENBAUM: Is your question are there
21 any facts?

22 MS. DORGE: In part.

23 MR. TENENBAUM: All of the documents and
24 depositions and so on that he has listed?

1 BY MS. DORGE:

2 Q. Any analytical data, any persons who
3 have told you what was meant by a statement like
4 that on a document?

5 MR. TENENBAUM: I am going to have to
6 object, that is vague and ambiguous and
7 compound.

8 MS. DORGE: Okay. Break it up.

9 Q. Do you have any analytical data or
10 other documents that explain what might be meant
11 by the word corrosive contained on a record of
12 wastes shipped to the Midco sites?

13 MR. TENENBAUM: Same objection.

14 A. Do I have any or does EPA have any?

15 BY MS. DORGE:

16 Q. EPA.

17 A. Well, I know we are working on
18 developing more information all the time. So I
19 really can't -- I don't know everything that we
20 have.

21 Q. At this point in time?

22 A. You mean that I know of?

23 Q. That EPA has, you are EPA's witness
24 today.

1 MR. TENENBAUM: Wait a minute.

2 We have objected to providing him as a
3 witness on the question that you just asked.

4 I don't know what document you are
5 talking about, and whose document it is and who
6 wrote corrosive. I don't know what you are
7 talking about. So I have to object.

8 Off the record for a second.

9 (Discussion had off the record.)

10 BY MS. DORGE:

11 Q. Has anybody from EPA sampled wastes
12 that were shipped to the Midco sites by
13 Motorola?

14 A. It's possible, yes, during the removal
15 action, or there was also some preliminary
16 sampling back at that time that sampled barrels
17 or wastes, sludges that were on the site.

18 We also, even during the RI, we sampled
19 the groundwater, and the highly contaminated
20 subsurface materials at both Midco I and Midco
21 II, which could have contained Motorola's
22 wastes.

23 Q. What facts support EPA's allegations
24 that hazardous substances were sent by Motorola

1 to the site?

2 What hazardous substances is EPA
3 alleging were sent to the site?

4 MR. TENENBAUM: One question at a time. You
5 have got more than one question.

6 MS. DORGE: You referred to the documents.
7 I think you have already answered the first one
8 by referring to the documents.

9 Q. What in those documents identifies a
10 hazardous substance that was shipped to the
11 site?

12 MR. TENENBAUM: Objection.

13 Seeks expert testimony on what is a
14 hazardous substance.

15 BY MS. DORGE:

16 Q. Is it EPA's position that it will be
17 presenting no factual testimony only expert
18 testimony on the subject?

19 MR. TENENBAUM: No.

20 MR. CLARK: Then permit the inquiry.

21 MR. TENENBAUM: The question asks for expert
22 testimony.

23 MR. CLARK: To the extent he has facts, that
24 is what the question is seeking.

1 We are all in agreement he is not here
2 to testify as an expert. So let him testify to
3 what facts, if any, there are within the
4 Agency's knowledge.

5 MR. TENENBAUM: As I have indicated, he
6 already has testified as to what -- in general
7 as to the types of facts that we are relying on.
8 And the investigation is ongoing.

9 And I don't know what more you want for
10 him to do.

11 I have objected to these types of
12 questions designed to probe the United States'
13 attorney work product as to what it has learned
14 from the various discovery in other matters that
15 have taken place in this case.

16 BY MS. DORGE:

17 Q. Has EPA sampled waste coming from
18 Motorola being disposed of at the Midco sites?

19 MR. TENENBAUM: Didn't you already ask that?

20 A. You mean prior to its being disposed of
21 or taken to the sites?

22 BY MS. DORGE:

23 Q. I am not talking about sampling of the
24 soils or anything like that at the sites.

1 Do you have any evidence relating to
2 the characteristics of the wastes shipped by
3 Motorola to the sites?

4 A. That is a different question. You mean
5 have we sampled the wastes as they went to the
6 sites?

7 Q. Have you sampled wastes coming into the
8 site?

9 A. You mean as the wastes were coming into
10 the sites during the Midco operation?

11 Q. Right.

12 A. Were there EPA people there collecting
13 samples of the waste?

14 Q. Yes.

15 A. As far as I know, that was never done,
16 no.

17 Q. What facts support your allegation that
18 the wastes found on the site came from Motorola?

19 MR. TENENBAUM: Same continuing objection.

20 A. Well, we know that from the shipping
21 documents and depositional testimony that the
22 wastes from Motorola went to the Midco sites.

23 And we know that from depositional
24 testimony that Motorola's wastes were dumped

1 directly into both Midco I and Midco II.

2 We know that the fire occurred at both
3 Midco I and Midco II which resulted in release
4 of hazardous substances into the air and the
5 groundwater and the soils.

6 We know that thousands of drums were
7 left on both sites.

8 Q. What hazardous substances --

9 A. We have sampled the barrels at the site
10 during the removal actions and during some
11 preliminary investigations we have sampled the
12 subsurface soils.

13 We have sampled the groundwater and the
14 hazardous substances. Some of the hazardous
15 substances present in those, in the groundwater,
16 soils and the barrels that were left on the site
17 are -- correspond to the wastes that were -- the
18 hazardous substances that were disposed of by
19 Motorola.

20 Q. Which hazardous substances are you
21 referring to?

22 MR. TENENBAUM: Same continuing objection.

23 He has already answered his basis for
24 this. If you know anything further, you can

1 tell them. But, that is an objectionable
2 question.

3 A. I understand that it included cyanide,
4 and other hazardous substances identified on
5 their permit application. And we may have other
6 information in our record.

7 BY MS. DORGE:

8 Q. Are there any other facts supporting
9 your allegation that cyanide was shipped to the
10 site apart from the permit application?

11 A. Not that I am aware of.

12 MR. TENENBAUM: You mean by Motorola?

13 MS. DORGE: By Motorola.

14 A. Not that I am aware of.

15 BY MS. DORGE:

16 Q. Okay.

17 MR. TENENBAUM: Again, this witness has not
18 been present at the depositions of Motorola and
19 so on, and the same continuing objection.

20 MS. DORGE: I am not asking him to testify
21 as to what Motorola knows.

22 MR. TENENBAUM: You limited him in the last
23 question to the permit application, and who
24 knows what else.

1 There is a long list of documents that
2 he mentioned before which might also contain
3 information on that.

4 MS. DORGE: Okay.

5 Q. Are there any facts supporting these
6 allegations that any hazardous substance other
7 than cyanide was disposed of at the Midco sites
8 by Motorola?

9 MR. TENENBAUM: Same continuing objection.

10 A. Yes.

11 The facts included in the documents I
12 have listed before, including the permit
13 application.

14 Q. Documents in the permit application are
15 the only facts that you are relying on?

16 MR. TENENBAUM: Including the depositions.

17 MS. DORGE: Including depositions.

18 A. For what?

19 Q. In support of your allegations that
20 Motorola disposed of hazardous substances.

21 A. I think as I stated before, I would
22 have to look through all the documents before I
23 could fully answer that question.

24 But, I was aware of that, plus there's

1 ongoing discovery on this matter. But, I am
2 aware that hazardous substances were identified
3 in this permit application.

4 Q. Again you have referred to documents.
5 You are referring to the document that we
6 produced and the Dehart documents and Intec
7 documents?

8 MR. TENENBAUM: And the documents that we
9 produced.

10 MS. DORGE: The documents you produced.

11 MR. TENENBAUM: And the depositions, so on.

12 BY MS. DORGE:

13 Q. Beyond those documents, are there any
14 independent facts explaining what Motorola sent
15 to the site?

16 A. I think I have already answered that
17 question.

18 Q. I don't think you have.

19 MR. TENENBAUM: I think he has answered it
20 three or four times.

21 A. Basically I don't know all the facts
22 and, therefore, I basically I guess I can't say
23 that there aren't any other facts.

24

1 BY MS. DORGE:

2 Q. EPA may have other facts at this point
3 in time that you are not aware of?

4 A. It is possible.

5 Q. But to the best of your knowledge,
6 those are all the facts?

7 A. Those are the facts that I am aware of
8 are contained in those documents.

9 Q. Who did you talk to at EPA in preparing
10 for this 30 (b) 6 deposition?

11 MR. TENENBAUM: Other than attorneys?

12 BY MS. DORGE:

13 Q. Other than attorneys.

14 A. No one.

15 Q. Did you make any effort other than
16 through your attorneys to find out what EPA knew
17 about waste dispose of by Motorola?

18 A. No.

19 MR. TENENBAUM: In preparation for the
20 deposition?

21 MS. DORGE: Yes. In preparation for the
22 deposition.

23 A. No.

24

1 BY MS. DORGE:

2 Q. Do you have any facts at this point,
3 apart from what is contained in the documents,
4 EPA has no facts supporting an allegation that
5 EPA disposed of hazardous substances?

6 MR. CLARK: I think you meant Motorola.

7 MS. DORGE: Okay.

8 Q. Does EPA have any facts that would
9 support an allegation that Motorola disposed of
10 salt at the Midco site?

11 A. I would have to review the documents.

12 MR. KEATING: If you do, let me know.

13 BY MS. DORGE:

14 Q. Is salt corrosive?

15 MR. TENENBAUM: Objection, asks for expert
16 testimony.

17 If you think you know the answer,
18 subject to my objection, I will allow you to
19 answer.

20 A. Salt by itself or salt water by itself
21 probably wouldn't be considered corrosive.

22 BY MS. DORGE:

23 Q. Would salt be considered corrosive?

24 MR. TENENBAUM: Same objection.

1 A. I don't know. Could be under some
2 situations.

3 BY MS. DORGE:

4 Q. Okay.

5 Does EPA have any facts that would
6 support an allegation that Motorola sent PCBs to
7 the Midco sites?

8 MR. TENENBAUM: Same continuing objection.

9 A. I'm not aware of any.

10 BY MS. DORGE:

11 Q. Arsenic?

12 MR. TENENBAUM: Same continuing objection.

13 A. I would have to review the record.

14 MR. TENENBAUM: Again, if you have any of
15 these records that you would like to show the
16 witness, please do and we will be glad to see --
17 he will be glad to supplement his answer.

18 If you would like to show him any
19 documents that have been referenced by the
20 witness, if they would help in refreshing his
21 recollection.

22 BY MS. DORGE:

23 Q. Have you reviewed the records, these
24 shipment records that we have been talking

1 about, to determine what volume of wastes were
2 shipped by Motorola or you are alleging was
3 shipped?

4 MR. TENENBAUM: Have we alleged that a
5 particular volume was sent? Have we?

6 MS. DORGE: No.

7 Q. Does RPA allege a certain volume of
8 wastes were shipped to the site?

9 MR. TENENBAUM: In its complaint?

10 MS. DORGE: I don't think it is in the
11 complaint.

12 MR. TENENBAUM: That's why I was asking.

13 BY MS. DORGE:

14 Q. Has EPA determined what volume was
15 shipped to the site?

16 A. All we have done is we have prepared a
17 document that lists total disposal based on the
18 records we have.

19 MR. TENENBAUM: One second.

20 I do have to object to this line of
21 questioning to the extent it seeks attorney work
22 product testimony, but you may continue your
23 answer subject to that objection.

24 A. We sent that information to all the

1 PRP's.

2 BY MS. DORGE:

3 Q. Did EPA review the types of containers
4 that were used as to distinguish between size of
5 containers which appear in that document?

6 A. I don't know.

7 Q. Do you know in what type of containers
8 Motorola allegedly shipped wastes to the Midco
9 sites?

10 A. No.

11 Q. Do you know whether they were different
12 sizes?

13 A. No.

14 Q. Are there any facts that support EPA's
15 issuance of the administrative order to Motorola
16 as opposed to other generators that shipped
17 larger volumes of wastes to the Midco site?

18 MR. TENENBAUM: Objection, vague, ambiguous
19 and may seek a legal conclusion. I am not sure
20 what the question means.

21 MR. BERMAN: What was the question again?

22 MS. DORGE: I am not asking for a legal
23 conclusion. I am not asking for anything that
24 is subject to deliberative-process.

1 I am simply a factual question, what
2 facts supported EPA's decision to issue an order
3 to Motorola, who was a much smaller alleged
4 contributor than many other companies who EPA is
5 aware of who --

6 MR. TENENBAUM: I think the witness already
7 testified to the kinds of facts that supported
8 the United States' allegation with respect to
9 Motorola.

10 And if you want to ask the witness
11 about other parties and facts relating to those
12 parties, you can identify such parties and he
13 can see what he can tell you.

14 But, as to reasons for EPA's issuance
15 of administrative orders, that would seem to be
16 not a proper question.

17 BY MS. DORGE:

18 Q. Is there anything in particular about
19 Motorola's wastes that caused EPA to decide to
20 issue an administrative order to Motorola?

21 MR. TENENBAUM: He has already indicated the
22 facts underlying the basis for order. I don't
23 know.

24 MS. DORGE: Either volume or nature of the

1 waste.

2 MR. TENENBAUM: But the premise built into
3 your question is the premise that would require
4 an answer explaining the basis for EPA's
5 decision making as to the issuance of
6 administrative orders.

7 I will have to object and instruct the
8 witness not to answer.

9 If you can rephrase your question as to
10 facts underlying, supporting the United States'
11 issuance of the administrative order to
12 Motorola, he can answer that. Although, he
13 already has many times today.

14 If you want to rephrase the question to
15 ask what facts support the liability or PRP
16 status of other parties, you can do that. But
17 other than that, I think that the question is
18 objectionable.

19 MS. DORGE: Let's ask for the EPA's issuance
20 of the administrative order to Motorola.

21 MR. TENENBAUM: We have just been talking
22 about that for an hour.

23 MS. DORGE: This is the first time I have
24 asked the question, so I am sure I don't have an

1 answer to it yet. If you could answer it.

2 MR. TENENBAUM: It is not the first time you
3 have asked the question.

4 MR. CLARK: Let him answer. If it is prior
5 testimony, let him just say it is his prior
6 testimony and we can move on.

7 MR. TENENBAUM: I will object, asked and
8 answered many times.

9 A. What was the question?

10 BY MS. DORGE:

11 Q. What facts support EPA's issuance of
12 the administrative order to Motorola?

13 A. Well, we have the liability information
14 that I previously listed.

15 Q. Is there anything particular about the
16 nature of that liability information that
17 supported the issuance of the order against
18 Motorola as opposed to other companies that were
19 not specific to Motorola?

20 MR. TENENBAUM: What other companies?

21 MS. DORGE: I can name them.

22 MR. TENENBAUM: It sounds like you are
23 asking, the question is why did EPA issue an
24 administrative order to Motorola and not to X, Y

1 and 2? And that's not a proper question.

2 MS. DORGE: I am asking if there are any
3 facts that support the issuance of the order.

4 MR. TENENBAUM: He has already answered
5 that.

6 BY MS. DORGE:

7 Q. Is the answer none other than pure
8 enforcement discretion?

9 MR. TENENBAUM: No. He has already answered
10 the facts.

11 MS. DORGE: He has indicated that there's
12 liability, and there is liability evidence
13 against other companies who were not named who
14 shipped much larger quantities of material.

15 MR. TENENBAUM: If your question then is why
16 did RPA not issue an administrative order to
17 other parties. Then that seeks to invade the
18 Agency's deliberative-process. It is
19 privileged.

20 Furthermore, that is not part of
21 your -- this witness is not a lawyer and I don't
22 know what he knows about that, if anything.

23 Hold it. That's not part of your
24 request.

1 MS. DORGE: The request has to do with the
2 nature -- my question has to do with facts
3 supporting the allegations against Motorola
4 and --

5 MR. TENENBAUM: He has gone over that. We
6 have covered the six categories in your
7 document.

8 Now you want to ask him about a
9 category that he is not here to testify about,
10 and in any event is objectionable.

11 MS. DORGE: It is covered by -- I think it
12 is covered, but I think we already have an
13 answer. The answer is it was solely a matter of
14 discretion, or the use thereof.

15 MR. TENENBAUM: That is your view.

16 MR. KEATING: This is off the record.

17 (Discussion had off the record.)

18 BY MS. DORGE:

19 Q. I think we may have covered this, but
20 let me just clarify.

21 Did you say EPA has made no
22 observations of Motorola's name on the drum,
23 nobody at EPA or no EPA contractor to your
24 knowledge has observed Motorola drums at the

1 site?

2 A. I would have to look at all the
3 records, but I am not aware of any.

4 Q. Okay.

5 It would be in what records would you
6 look at to determine that?

7 A. I could look at the -- all the records
8 for the removal action.

9 Q. So if you have any knowledge it should
10 be contained in the documents from the removal
11 action?

12 A. Or there's probably some preliminary
13 inspections, I would look at preliminary
14 inspections, back in 1978.

15 Q. Anything else?

16 A. '78 to '80.

17 MR. TENENBAUM: Your question is documents,
18 what documents?

19 MS. DORGE: Yes, anything else that you
20 would look at.

21 MR. TENENBAUM: What other documents would
22 he look at?

23 MS. DORGE: Right.

24 A. Well, I guess I would probably have to

1 check the -- this is for what now?

2 Q. Whether Motorola --

3 A. Whether EPA saw any Motorola drums on
4 the site?

5 Q. Actually saw anybody disposing of
6 Motorola waste.

7 MR. TENENBAUM: Hold it.

8 The question that is whether there was
9 a drum with Motorola's name on it?

10 MS. DORGE: I think we have already asked
11 the other question.

12 MR. TENENBAUM: That was the question, a
13 drum with Motorola's name on it?

14 MS. DORGE: Yes.

15 A. That was observed by EPA employees or
16 by some other government employees?

17 Q. Right.

18 A. That's all I could think of.

19 Q. Are there any people that you would
20 talk to?

21 A. I might try calling a few people, I'm
22 not sure.

23 Q. Who would you call?

24 A. I could call Beverly Rush.

1 Q. Is Beverly Rush at EPA?

2 A. Yes. She is a unit chief at EPA.

3 Q. Region V?

4 A. Yes.

5 Q. But you did not call her to prepare for
6 this deposition?

7 A. No. I could call Bill Simes.

8 Q. Anybody else at EPA?

9 Is he with EPA?

10 A. Yes.

11 Q. Anybody else?

12 A. Those are the only people I can think
13 of right now.

14 Q. Why would you call them?

15 A. I would ask them the question you asked
16 me, whether they ever saw Motorola, a drum
17 labeled Motorola on one of the sites.

18 Q. Were they involved in the removal
19 action?

20 A. Yes.

21 Q. They spent time at the site?

22 A. Yes.

23 Q. Did anybody else at EPA spend time at
24 the site?

1 A. USEPA --

2 MR. TENENBAUM: Wait. At what time?

3 A. During what time? Yes.

4 BY MS. DORGE:

5 Q. At any time.

6 A. Yes. A lot of people did.

7 Q. Never mind.

8 MR. TENENBAUM: By the way, I would note for
9 the record that there is no category listed as
10 to whether or not a drum with Motorola's name
11 was found on the site. That is not one of the
12 categories listed.

13 BY MS. DORGE:

14 Q. Does anybody at EPA have knowledge as
15 to whether one of Motorola's drums were found at
16 the site?

17 A. I don't know. As I said before, if I
18 really wanted to find out I would probably call
19 a few people.

20 Q. You would start with these two and you
21 might talk to other people?

22 A. Yes, I might I guess. Dick Cleaton, he
23 was with the Indiana State Board of Health. He
24 inspected the site. And there's a number of

1 other inspectors who were on the site.

2 Q. Anybody else at EPA?

3 A. There were a lot of people involved in
4 the removal action. But, I probably wouldn't
5 bother calling all of them.

6 Q. Did you make any attempt to contact any
7 of these people in preparing for your
8 deposition?

9 A. No.

10 MR. TENENBAUM: Again, I note there's no
11 category on this designation as to whether or
12 not a drum with Motorola's name on it was found
13 at the site.

14 MS. DORGE: There certainly is a category as
15 to whether Motorola's waste was disposed of at
16 the site. And I think that is clearly relevant
17 to that question.

18 Q. Let me ask you one more. I think I
19 just have one more question.

20 You previously testified in response to
21 questions by Standard T that EPA never approved
22 or disapproved respondents designated engineer,
23 pursuant to the administrative orders.

24 Is your response the same for Motorola?

1 A. I would have to look at the letters to
2 see whether you were one of the parties that
3 sent in the letter proposing to use Roy Ball as
4 the project coordinator, I guess it is called.

5 Q. Assuming Motorola did designate Roy
6 Ball.

7 A. Yes.

8 Q. Did EPA ever approve or disapprove that
9 designation?

10 A. No, because Motorola as well as the
11 other parties never indicated they would comply
12 with the order.

13 MS. DORGE: Can we go off the record for a
14 second.

15 (Discussion had off the record.)

16 Let's go back on the record.

17 Q. Does EPA have any facts that would
18 indicate waste, Motorola waste was trans-shipped
19 and not disposed of at the Midco sites, wastes
20 collected by Midco?

21 MR. TENENBAUM: I don't understand that
22 question as all.

23 If you want to cut off -- I don't want
24 to tell you how to phrase your question. But,

1 when you say trans-shipped, but not disposed of.
2 I don't know what that means. If you just want
3 to say trans-shipped.

4 BY MS. DORGE:

5 Q. Does the EPA have any facts that would
6 indicate Motorola waste may have been collected
7 by the Midco group and either not taken to the
8 Midco sites or taken to the Midco sites but not
9 unloaded or handled there and ultimately
10 disposed of at other sites?

11 MR. TENENBAUM: I will have to object to
12 that. It is vague, ambiguous. Also my previous
13 grounds for objections that you are asking the
14 witness to interpret --

15 BY MS. DORGE:

16 Q. Do you understand the question?

17 MR. TENENBAUM: -- interpret. You are
18 asking the witness to interpret information
19 provided by third parties.

20 Do you understand the question?

21 A. Do you mean do we have any evidence
22 that wastes picked up by Midco were disposed of
23 at some other site?

24 MS. DORGE: Yes.

1 A. Not that I am aware of, no.

2 Q. Did you make any effort to determine
3 whether the waste may have been taken to another
4 site and not Midco?

5 A. Yes.

6 MR. TENENBAUM: Wait.

7 Go ahead and answer.

8 I will have to object. This is
9 extremely vague and ambiguous. We don't know
10 what waste you are talking about and it is not
11 clear what events you are talking about.

12 I reiterate my previously objections on
13 this line of questioning. But, try to answer
14 the best you can.

15 A. As I stated before, we have information
16 from the shipping documents. We have got the
17 depositions. We have got the information from
18 your 104 E responses. We have got permit and
19 permit applications. We have --

20 BY MS. DORGE:

21 Q. Is your answer that the answer is
22 contained in the documents?

23 A. Yes.

24 Q. You have no independent -- there are no

1 individuals with knowledge?

2 MR. TENENBAUM: Firsthand knowledge?

3 MS. DORGE: Firsthand that Motorola's wastes
4 may have been taken to other sites and not to
5 Midco.

6 MR. TENENBAUM: No individuals at EPA?

7 BY MS. DORGE:

8 Q. Do you know of any individuals?

9 A. We have depositional transcripts of
10 people who observed Motorola's wastes being
11 disposed of at both Midco I and Midco II.

12 Q. Does EPA have any knowledge that is not
13 contained in those documents?

14 A. I would have to review the file to
15 provide an answer to that.

16 Q. Would the answer be contained in the
17 file?

18 A. Would you repeat the question?

19 Q. Could you read back the question.

20 (The record was read.)

21 MR. TENENBAUM: I have to object as vague,
22 ambiguous.

23 Go ahead if you know what she is
24 talking about. Go ahead and answer.

1 A. I think I stated before for other
2 companies, we have information, we have the
3 shipping documents which identify that the
4 wastes were picked up by Midco.

5 We have got the depositions. We have
6 got analytical results from the RI/FS and other
7 studies that show that this same type of waste,
8 hazardous substances that Motorola generated and
9 had disposed of at the site, are present in the
10 groundwater and in the soils, and in some of the
11 drums on the site.

12 BY MS. DORGE:

13 Q. Let me limit my question just to EPA
14 and EPA employee's right now.

15 Is there anybody at EPA who knows or
16 has facts relating to whether Motorola's waste
17 might have been taken to another site for
18 disposal, might have been taken by the Midco
19 group to a site other than the Midco sites for
20 disposal?

21 MR. TENENBAUM: Firsthand knowledge?

22 A. You mean direct observation?

23 BY MS. DORGE:

24 Q. I don't mean direct observation. I

1 mean knowledge, facts, apart from that gained
2 from third -- well --

3 MR. TENENBAUM: You want to know whether
4 they were there and saw something like that?

5 MS. DORGE: No.

6 Q. Do they have knowledge of facts?

7 MR. TENENBAUM: I don't know how this
8 witness can testify what everybody at EPA has
9 read about the case. I mean all the transcripts
10 and documents speak for themselves.

11 Do you want to know whether all the
12 hundreds of people at EPA might have read some
13 transcript that says something or other? I
14 don't know what.

15 BY MS. DORGE:

16 Q. I am asking whether apart from what is
17 contained in the file in these documents that
18 you referred to in the deposition transcripts
19 that you referred to. I mean other facts.

20 A. That I am aware of?

21 MR. TENENBAUM: That would show what?

22 A. That would show?

23 BY MS. DORGE:

24 Q. That Motorola's waste, whether or not

1 Motorola's waste actually were disposed of at
2 Midco or may have been taken to another site?

3 MR. TENENBAUM: Which?

4 BY MS. DORGE:

5 Q. The question is whether, do you have
6 any facts relating to where the waste was
7 ultimately ended up?

8 MR. TENENBAUM: That's an entirely different
9 question. Although, the same objections apply.

10 But, where the waste went, where parts
11 of the wastes ended up, is an entirely different
12 question. That is a new one.

13 MS. DORGE: It wasn't intended to be a new
14 one.

15 MR. TENENBAUM: Where pieces of the waste
16 may end up, is not the same.

17 BY MS. DORGE:

18 Q. Does EPA have facts apart from what is
19 contained in documents and deposition testimony
20 that is written down that Motorola's waste --
21 indicating that Motorola's waste may have been
22 picked up by the Midco group and taken to the
23 Midco site, but not disposed of there,
24 ultimately disposed of at another site?

1 MR. TENENBAUM: Objection. Vague,
2 ambiguous.

3 A. I think I have to say that there is
4 nothing in any of the documents that I have read
5 that indicated that -- which seems to be your
6 implication -- that the documents we have
7 indicate that. And that is absolutely not true.
8 There is no documents at all that I know of that
9 say that has happened.

10 BY MS. DORGE:

11 Q. Based upon the documents?

12 MR. TENENBAUM: That he has reviewed?

13 A. That I personally reviewed?

14 MR. TENENBAUM: Again, I object strenuously
15 to this line of questioning, asking the witness
16 to interpret --

17 MS. DORGE: I am not --

18 MR. TENENBAUM: If I could finish my
19 objection.

20 -- asking the witness to interpret the
21 depositions which he hasn't even read and which
22 you are not producing a witness for us.

23 MS. DORGE: We are not asking about
24 third-party knowledge.

1 We are not asking about information
2 contained in documents.

3 Q. Is there any other information?

4 A. That what?

5 MR. TENENBAUM: Why don't you ask the
6 question. It seems like what you are asking,
7 why don't you ask it straightforward, whether
8 anyone at EPA personally observed Motorola's
9 waste being taken by the Midco group to some
10 other site.

11 Is that what you are asking?

12 MS. DORGE: I am asking whether anybody at
13 EPA has knowledge that is not reflected in the
14 documents.

15 MR. TENENBAUM: That is too vague and
16 ambiguous. Impossible to answer.

17 A. That is impossible to answer for
18 everyone in EPA.

19 BY MS. DORGE:

20 Q. Have you talked to anyone at EPA about
21 this?

22 In preparing for your deposition, have
23 you talked to anybody at EPA about where
24 Motorola's waste was ultimately disposed of in

1 preparation for this deposition?

2 MR. TENENBAUM: Object. I don't know what
3 you mean by ultimately disposed of.

4 BY MS. DORGE:

5 Q. Have you talked to anybody at EPA about
6 where the waste that was picked up by the Midco
7 group was ultimately disposed of?

8 MR. TENENBAUM: Same objection.

9 A. During what period of time?

10 BY MS. DORGE:

11 Q. I am asking whether in preparing for
12 today's deposition, which has to do with the
13 disposal of waste by Motorola at Midco, you
14 consulted with anybody at EPA to find out
15 whether they knew whether waste picked up by the
16 Midco group from Motorola's facility went to
17 Midco?

18 MR. TENENBAUM: Wait a second.

19 You left out the part from all the
20 transcripts and so on.

21 MR. CLARK: That is a premise of the
22 question, counsel. We have established that.

23 MR. TENENBAUM: She didn't say it, though.

24 MR. CLARK: Do you have to take every

1 premise that we have established in the
2 deposition and repeat it for every question?

3 I mean, you have been very
4 obstructionist.

5 MR. TENENBAUM: I don't know what she means.
6 Otherwise, she is going to quote the question
7 back and say he didn't do anything to prepare
8 for this deposition,

9 BY MS. DORGE:

10 Q. When did you first review the 30 (b) 6
11 notice of the deposition?

12 A. Me personally? I depended on counsel.

13 Q. When did you first look at it?

14 A. I depended on counsel to review that.

15 MR. TENENBAUM: I am not going to allow you
16 to ask questions about counsel.

17 BY MS. DORGE:

18 Q. Did you read it in preparing for your
19 deposition?

20 A. No.

21 MR. TENENBAUM: As I have indicated, this
22 request is similar to the requests made by
23 Insilco and American Can and Desoto.

24 And we have made the same objections to

1 this request as to those requests. And this
2 witness is testifying in the same fashion as he
3 did with respect to those, subject to my
4 objection.

5 BY MS. DORGE:

6 Q. You have already indicated you did not
7 talk to anybody else at EPA in preparing for
8 this deposition?

9 A. Other than counsel. Yes.

10 Q. Did you determine that it was not
11 necessary to talk to other people or were you --

12 MR. TENENBAUM: What?

13 BY MS. DORGE:

14 Q. Did you determine that it wasn't
15 necessary to talk to anybody else, because no
16 one else had any knowledge?

17 A. Did I determine that?

18 Q. Yes.

19 A. I doubt if anyone else would be worth
20 talking to about your liability case. I don't
21 think anyone else has that much more knowledge
22 than I have, other than counsel.

23 Q. You have identified several people who
24 you might talk to, Beverly Rush, Bill Simes?

1 A. That was regarding --

2 MR. TENENBAUM: Objection.

3 He did not say mention those names as
4 people who would have knowledge of what you
5 referred to.

6 A. No.

7 MR. TENENBAUM: He identified those names as
8 some tiny tangent of your question.

9 MS. DORGE: The record speaks for itself.

10 Q. Were you directed by counsel not to
11 talk to anybody?

12 MR. TENENBAUM: Come on. Objection.

13 You can't ask him what he was told by
14 counsel. Direct the witness not to answer.

15 BY MS. DORGE:

16 Q. We still don't have an answer to the
17 other question on trans-shipments?

18 A. What is the question?

19 Q. The question is, apart from information
20 contained in documents, deposition testimony and
21 third-party information; does anybody at EPA
22 have knowledge relating to whether Motorola's
23 waste picked up by the Midco group was actually
24 disposed of at the Midco site?

1 MR. TENENBAUM: Object to the form.

2 A. Anybody at EPA have knowledge?

3 BY MS. DORGE:

4 Q. Yes.

5 A. Besides me?

6 Q. Yes.

7 MR. TENENBAUM: Object to the form. I
8 reiterate my previous objection.

9 A. Yes, counsel would have some knowledge
10 on that.

11 BY MS. DORGE:

12 Q. Anybody else?

13 A. About what now?

14 MR. CLARK: Same question.

15 A. About trans-shipments. Trans-shipments
16 between Midco I and Midco II, is that what you
17 are talking about?

18 BY MS. DORGE:

19 Q. No.

20 MR. TENENBAUM: No.

21 You used trans-shipments in your
22 question.

23 MS. DORGE: But not between Midco I and
24 Midco II.

1 A. So what are you talking about as far as
2 trans-shipments go?

3 BY MS. DORGE:

4 Q. Your counsel objects when I ask a short
5 question. Then he objects to a compound
6 question when I ask a long question, which I
7 don't really believe is a compound question. It
8 is just long.

9 But, it is very difficult for me to
10 phrase this question because it can't be done
11 without having it be very long, unless your
12 counsel will let me do it in pieces.

13 Let me try to ask a short question and
14 if your counsel won't object, maybe we will get
15 an answer.

16 I am trying to find out whether anybody
17 at EPA knows whether Motorola's waste was
18 either -- I am going to ask, there are two
19 questions, I will ask them separately.

20 Motorola's was waste taken to Midco but
21 not disposed of there, was actually disposed of
22 at some other site other than Midco I and Midco
23 II. That's what I mean by trans-shipment.

24 A. So you are asking whether anyone from

1 EPA knows that Motorola's wastes were disposed
2 of someplace else other than Midco?

3 Q. Yes.

4 MR. TENENBAUM: Apart from what is contained
5 in the documents, third-party material?

6 MS. DORGE: Right.

7 A. The documents don't indicate anything
8 like that as far as I know.

9 MR. TENENBAUM: The question is apart from
10 whatever the documents and third-party materials
11 are, whether there's someone in EPA who has
12 knowledge, firsthand knowledge of that.

13 A. Firsthand knowledge or any knowledge?

14 MR. TENENBAUM: If it is apart from the
15 documents that you have referenced.

16 MS. DORGE: Personal knowledge.

17 A. Of course, I can't speak for everyone
18 in the Agency, but as far as I am aware of, no
19 one has any information or knowledge that that
20 ever occurred.

21 BY MS. DORGE:

22 Q. Who would you ask who might have such
23 knowledge?

24 Who would you ask if you were trying to

1 determine whether anybody has it, such
2 knowledge?

3 A. You mean anyone in EPA?

4 Q. Yes.

5 A. I doubt if anyone in EPA has that
6 knowledge, because they weren't at the site or
7 weren't associated with the business that Midco
8 was conducting during its period of operation.

9 Q. So you wouldn't ask anybody because you
10 wouldn't have any people who you would think
11 would have that knowledge?

12 A. Right.

13 Q. Okay.

14 I think you answered the question, the
15 second part of my question, when you rephrased
16 the question.

17 Is there anybody who would have
18 knowledge that Motorola's wastes was picked up
19 by Midco and just taken directly to another site
20 as opposed to the Midco sites?

21 MR. TENENBAUM: Again, apart from various
22 documents and transcripts you have identified?

23 BY MS. DORGE:

24 Q. Right.

1 A. Again as far as I know, this is EPA
2 employees?

3 Q. Yes.

4 A. As far as I know, no EPA employees have
5 any information on that at all, that that ever
6 occurred.

7 O. Okay.

8 MR. TENENBAUM: Can you read back the
9 question that that was an answer to, please.

10 (The record was read.)

11 A. What is the difference between that and
12 trans-shipments? It sound like the same thing
13 to me.

14 MS. DORGE: The first question had to do
15 with waste possibly being taken to the Midco
16 property but not disposed of there, moved to
17 another location for disposal.

18 MR. TENENBAUM: Well, I don't know that
19 there is a question pending. You don't need to
20 ask her questions.

21 Is there another question?

22 BY MS. DORGE:

23 Q. The answer is you don't have any
24 information?

1 MR. CLARK: The witness just wanted a
2 clarification of a question, counsel. And now
3 you are telling him not to answer.

4 Does that answer your question, Mr.
5 Boice?

6 MR. TENENBAUM: He is not going to ask
7 questions. Is there anything that you want to
8 add to your answer?

9 A. No.

10 MR. CLARK: That's fine.

11 BY MS. DORGE:

12 Q. Did that change your earlier answer?

13 A. No. I just wanted, it sounded like the
14 same question.

15 Q. One more question.

16 Earlier you referred to interviews as
17 being part of the body of information that
18 relates to whether Motorola arranged for
19 disposal of wastes at the Midco site.

20 When you refer to interviews, are you
21 referring to interviews with anybody at EPA or
22 are these all third parties you are talking
23 about?

24 A. There would be third parties.

1 MS. DORGE: No further questions.

2 (Whereupon a short recess was taken.)

3 MR. KARAGANIS: Back on the record.

4 DIRECT EXAMINATION

5 (CONTINUED)

6 BY MR. KARAGANIS:

7 Q. Mr. Boice, following your deposition
8 yesterday, did you go back and get a list of the
9 documents that were referenced relating to the
10 history of removal at Midco I?

11 A. I got our response to the first set of
12 interrogatories from the generator defendants
13 that we prepared in 1985.

14 Q. Did you bring those with you?

15 A. Yes.

16 Q. May I see them, please.

17 While he is looking at that, would you
18 get out the original ROD index that had the
19 Capper memorandum in it, please.

20 MR. TENENBAUM: Off the record for a second.

21 (Discussion had off the record.)

22 A. Okay.

23 BY MR. KARAGANIS:

24 Q. Could I see the Capper memorandum,

1 which you identified for me.

2 That is a memorandum by Christopher J.
3 Capper, C-a-p-p-e-r, to the administrator?

4 A. Correct.

5 Q. Okay.

6 That's in a green binder entitled, "
7 USEPA administrative record index Midco I, Gary,
8 Indiana, September, 1987, Part 1 of 6"?

9 A. Correct.

10 Q. Now, the work that is referred to in
11 the April 1, 1982 Capper memorandum, is that the
12 work you referred to before as the removal
13 action at Midco I?

14 MR. TENENBAUM: Same continuing objection.

15 A. Yes. Although, there was also an
16 action to put a fence around Midco I.

17 BY MR. KARAGANIS:

18 Q. Okay.

19 A. Which is also considered a removal
20 action.

21 Q. All right.

22 Let's deal first with the actions that
23 were part of the Capper memorandum, which I will
24 want copies of, and on a break we will make

1 copies and then you can have your fellows baby
2 sit while the copies are made, but we are going
3 to mark them as exhibits.

4 I will just mark it at this point with
5 a removable sticker.

6 MR. BERMAN: You are just marking that
7 temporarily?

8 MR. KARAGANIS: Temporarily for copying
9 purposes. Okay.

10 Q. The work that is involved in the April
11 1, 1982 Capper memorandum, was then the removal
12 of the barrels, the removal of some of the
13 contaminated soil, and the placement of a cap;
14 is that right?

15 MR. TENENBAUM: Objection, no foundation.

16 BY MR. KARAGANIS:

17 Q. Go ahead.

18 A. Installation or placement of a
19 temporary clay cover, I would say, along with
20 the other things you mentioned.

21 Q. All right.

22 Now, you mentioned a fence around Midco
23 I. What action was taken with regard to a
24 fence?

1 A. Prior to the removal of the drums, a
2 fence was placed around the site.

3 Q. Was that a fence totally around the
4 site?

5 A. At Midco I?

6 Q. Yes.

7 A. Yes.

8 Q. Okay.

9 So --

10 A. As far as I know it was, it should have
11 been.

12 Q. Is Midco I totally fenced?

13 A. At that time my understanding is that
14 it was totally fenced, yes.

15 Q. Is it currently totally fenced?

16 A. Midco I?

17 Q. Yes.

18 A. Yes. Well, no. Because, part of the
19 side is east of Blaine Avenue and that portion
20 is not fenced.

21 Q. Was the site subsequent to the fencing
22 expanded in size, is that right?

23 Why wasn't that portion fenced in the
24 initial fencing?

1 A. I believe it was.

2 Q. I am sorry, I am confused.

3 I thought you said to me there is a
4 portion of the Midco I site that is not fenced?

5 A. That is presently right.

6 Q. Okay.

7 How did that happen, why wasn't it
8 fenced?

9 A. It was fenced prior to the removal
10 action. That is my understanding. Later
11 somehow the fence got torn down, I presume.

12 Q. Do you know when the fence got torn
13 down?

14 A. No, I don't.

15 Q. Was it prior to the time of you
16 becoming remedial program manager?

17 A. Yes.

18 Q. So it has been torn down since 1985; is
19 that right?

20 A. No, because the PRP's put a portion of
21 it back up.

22 Q. Did they put all of it back up?

23 A. They put up to cut off the part west of
24 Blaine Street. A portion east of Blaine Street

1 is not fenced.

2 Q. Now, was that done in consultation with
3 RPA?

4 A. What is that?

5 Q. The partial replacement of the fence?

6 A. Yes.

7 Q. Okay.

8 Did you ask the PRP's to fence the area
9 east of Blaine Street?

10 A. I sent -- I told Roy Ball that ATSDR
11 had recommended that the portion east of Blaine
12 Street be fenced.

13 Q. Did you ever ask the PRP's to fence the
14 portion east of Blaine Street?

15 A. No.

16 Q. Did you ever take action on your own to
17 fence the portion east of Blaine Street?

18 A. Now we have that, an RD contract, it is
19 incorporated into that contract.

20 Q. I am asking between the period from
21 1985 to the time you became remedial program
22 manager, or remedial project manager -- which is
23 it?

24 A. Project.

1 Q. -- remedial project manager and the
2 time of the issuance of the record of decision,
3 why didn't EPA ever fence the site east of
4 Blaine Street?

5 A. Well, we probably -- it wouldn't have
6 been a bad think to do. It would have been a
7 good thing to do, but we didn't. I don't know
8 why.

9 Q. Would you have done so if you
10 considered that the exposure of the site without
11 a fence east of Blaine Street represented a
12 threat to human health or welfare?

13 MR. TENENBAUM: I am going to have to object
14 to this line of questioning.

15 As I indicated yesterday, this witness
16 is not our designee on any removal or has not at
17 this point in time been designated as a designee
18 on removal type activities.

19 And, furthermore, to the extent that
20 you are asking questions as to the basis for the
21 Agency's decision-making process on the removal
22 activities, that would seem to me to be getting
23 into a deliberative-process type decision.

24 MR. KARAGANIS: I am asking whether or not

1 or not, this goes to whether or not the
2 defendants have a basis and sufficient cause for
3 refusing in your terms, not in theirs, to obey a
4 106 order, whether or not the Agency has
5 considered existing conditions historically an
6 endangerment to public health.

7 MR. TENENBAUM: I don't follow that logic of
8 that at all.

9 MR. KARAGANIS: I am sorry that you don't.

10 But, the fact is that if the Agency and
11 this gentleman have known about a condition of
12 an unfenced site for three years, they either
13 did one of two things: They either neglected
14 their duty to fence the site and protect the
15 public health or, alternatively, they believe
16 that the site did not represent a significant
17 enough health threat to take immediate action to
18 fence the site.

19 MR. TENENBAUM: Okay.

20 It sounds like I don't agree with what
21 you are saying, but it sounds like you are
22 seeking to take discovery on the imminent and
23 substantial endangerment issue and that, as you
24 know, as we have indicated, that is a

1 supposition, that is a record-review issue and,
2 therefore, that is not a proper line of
3 discovery.

4 MR. KARAGANIS: Whether or not we are
5 refusing to undertake an order in bad faith.

6 MR. TENENBAUM: You used the words bad
7 faith. I don't know.

8 Where do you see the words bad faith in
9 the statute?

10 MR. KARAGANIS: Well, do you consider that
11 the refusal to obey an order with a good faith
12 reason constitutes sufficient cause, Mr.
13 Tenenbaum?

14 MR. TENENBAUM: I am not here to debate the
15 legal meaning of that section of the statute.
16 But, I was just noting that for the record bad
17 faith does not appear there.

18 MR. KARAGANIS: There is a pending question.

19 MR. KEATING: I wanted to wait to you are
20 done. The question goes to the issue of past
21 costs.

22 MR. KARAGANIS: That's right.

23 MR. KRATING: As to monies that were
24 expended and monies that are being requested.

1 As to what was done, I would like to find that
2 out. What was done with the monies?

3 MR. TENENBAUM: Which costs are you
4 referring to?

5 MR. KEATING: I will start off with the
6 fence. The condition of the properties, both of
7 the sites.

8 MR. TENENBAUM: Which costs are you
9 referring to that you think.

10 MR. KEATING: The past cost being claimed as
11 to what was done by the EPA.

12 There is also a 1985 --

13 MR. TENENBAUM: The past costs --

14 MR. KEATING: -- consent order issued as to
15 what monies, what was to be done pursuant to the
16 monies that were paid. And I think the question
17 goes to that.

18 MR. TENENBAUM: I don't see how. But, if
19 there is a particular cost you want to ask the
20 witness about.

21 MR. KEATING: The fence. He was on the
22 fence.

23 MR. TENENBAUM: I think he has already told
24 you. I don't even know whether the fence is one

1 of the costs.

2 He has already told you about the fence
3 there, and I don't know what costs in connection
4 with the fence he can say more about.

5 MR. KEATING: I don't know who took the
6 fence down. I don't know who paid for it. I
7 know who paid for putting the fence up. I would
8 like to find out who the hell took it down, if
9 that occurred.

10 MR. TENENBAUM: I don't know what the facts
11 are there.

12 But, if you want to ask your questions
13 in terms of whether or not EPA is seeking costs
14 relating to the putting up or taking down of a
15 fence, then that would be a legitimate question.

16 BY MR. KARAGANIS:

17 Q. Mr. Boice, I want to show you a map or
18 diagram that is called Figure 1-2 Midco I site
19 boundaries that is contained as a map in a
20 document called, "Declaration for the record of
21 decision, Midco I."

22 Are you familiar with that map?

23 A. Yes.

24 Q. All right.

1 Directing your attention to that map,
2 it shows that the site that is called Midco I
3 site extends across Blaine Street, does it not?

4 A. That's correct.

5 Q. Is it your testimony that the fenced
6 area is only the area along the western side of
7 Blaine Street?

8 A. That's correct.

9 Q. Okay.

10 Do you know whether the site east of
11 Blaine Street was ever fenced?

12 A. I believe it was fenced, yes.

13 Q. What data do you have to support that?

14 A. There is an aerial photo that shows a
15 fence including that portion of the site.

16 Q. Okay.

17 Directing your attention to an April
18 13, 1982 memorandum, which is a memorandum from
19 George Madny, M-a-d-n-y, to a Captain Harold
20 Norton, subject, "Fencing of Midco I and II."

21 Are you familiar with that document?

22 MR. TENENBAUM: While the witness is
23 reviewing the document, I will state for the
24 record again the United States' position that

1 discovery into imminent and substantial
2 endangerment is a record issue and therefore is
3 not proper.

4 I am allowing a couple questions to see
5 if you can tie this together, subject to my
6 objections.

7 MR. KARAGANIS: It is both costs and
8 sufficient cause, sir.

9 MR. TENENBAUM: You have not -- we don't
10 agree with what you said on sufficient cause.
11 You have not said anything to take that outside
12 of a record issue in our view.

13 So I am allowing the witness to answer
14 subject to my objections, just on a very limited
15 basis to see if we can tie this into any cost
16 issue. So far it hasn't been tied in.

17 A. I have seen this letter before. Yes.

18 BY MR. KARAGANIS:

19 Q. Does that memorandum indicate that at
20 the request of the US Attorney's Office, the
21 Blaine Street portion of the site was not
22 fenced?

23 A. It says that --

24 MR. TENENBAUM: We haven't established

1 what --

2 We have established he has seen this
3 letter. We haven't established he knows
4 anything else about its meaning.

5 BY MR. KARAGANIS:

6 Q. Well, the letter indicates, the
7 memorandum which is part of what you
8 euphemistically called the record indicates that
9 at the request of the US Attorney's Office,
10 Blaine Street was not fenced.

11 Now I am trying to find out whether
12 Blaine Street ever was fenced or wasn't fenced.
13 There is an apparent inconsistency between the
14 record and this witness' testimony.

15 MR. TENENBAUM: He can only tell you what --

16 That is the whole point that I was
17 making earlier, that this witness didn't start
18 working for the Agency on this site until 1985.

19 MR. KARAGANIS: But he knows about the site.

20 MR. TENENBAUM: Therefore, that is why I
21 said he was not being designated on removal-type
22 issues.

23 MR. KARAGANIS: He knows about the site. He
24 indicated that at one time he believed that the

1 site was fenced east of Blaine Street.

2 I am simply trying to find out looking
3 at this memorandum, which indicates that the
4 site wasn't to be fenced east of Blaine Street,
5 whether or not that refreshes his recollection
6 and will clarify whether historically the site
7 has been fenced east of Blaine Street.

8 MR. TENENBAUM: We will see if this
9 refreshes the witness' recollection.

10 But, I will ask the witness to please
11 limit his testimony to what he personally knows
12 to be a fact. And if somebody else knows the
13 answer to the question, then the witness should
14 indicate that somebody else would know the
15 answer to the question. You are not here to
16 speculate.

17 A. We could look at an aerial photo.

18 BY MR. KARAGANIS:

19 Q. Is there an aerial photo in the record
20 which would reflect what the status of the
21 fencing around the site was?

22 A. I think there is a photocopy of an
23 aerial photo. I don't know whether that would
24 be clear enough or not, but it might be.

1 Q. Are there aerial photos, copies of
2 aerial photos in the record -- xerox copies I
3 take it you are referring to?

4 A. Yes.

5 Q. Where are the originals of the photos?

6 A. In EPA's office.

7 Q. So the originals of the photos are not
8 part of the record, is that correct?

9 A. They are not part of the physical
10 record that is available for public review.
11 Of course, the public could also always request
12 to see the originals if they wanted to.

13 Q. Okay.

14 Is it part of the record that has been
15 certified to the court?

16 A. Yes.

17 Q. The photos?

18 A. Yes.

19 Q. The photos are?

20 A. Yes.

21 Q. They are included in the physical
22 record that has been certified to the court?

23 A. We certified the index to the court,
24 not the physical record.

1 Q. Would you bring the photos back after
2 the lunch break, please?

3 A. Okay.

4 Q. Now, directing your attention to the
5 time during which the you say the fence came
6 down east of Blaine Street.

7 A. I know it wasn't there.

8 Q. All right.

9 A. In fact --

10 Q. When did you first notice it wasn't
11 there?

12 A. When I became RPM.

13 Q. In 1985?

14 A. Yes.

15 Q. All right.

16 MR. TENENBAUM: How is this relevant to a
17 cost issue?

18 MR. KARAGANIS: It is relevant to a cost
19 issue and relevant to sufficient cause, if the
20 government is seeking to recover costs that
21 relate to the fencing of a site or the enclosure
22 of a site as being necessary under either
23 Section 107 of the NCP or Section 106.

24 We would argue that it is not necessary

1 and not required under the NCP in part because
2 the government hasn't done anything about it for
3 five years.

4 MR. TENENBAUM: He just said that the ATSDR
5 recommended to Mr. Ball that a fence be put up.

6 MR. KARAGANIS: He didn't say ATSDR
7 recommended. Mr. Ball recommended that the
8 fence be put. He said that he recommended that
9 a fence be put up. He said he was told by Mr.
10 Ball.

11 Listen to the testimony, please. You
12 just said that ATSDR told Mr. Ball.

13 MR. TENENBAUM: I must have misstated that.

14 MR. KARAGANIS: You did misstate the
15 transcript.

16 Now I am trying to recreate accurately,
17 Mr. Tenenbaum, the facts that occurred with
18 regard to the fencing.

19 MR. TENENBAUM: You didn't ask the witness
20 yet whether he is seeking cost of fencing or
21 whether that was already paid as part of the
22 partial consent decree.

23 MR. KARAGANIS: You are seeking in your
24 complaint a declaration, Mr. Tenenbaum, that we

1 should be liable, the defendants should be
2 liable for all future costs, including fencing.

3 Q. I take it you are seeking fencing, are
4 you not?

5 MR. TENENBAUM: That is a new question.

6 BY MR. KARAGANIS:

7 Q. Are you seeking fencing costs?

8 A. I guess that hasn't been determined
9 yet.

10 Q. Well, are you seeking to fence this
11 site?

12 A. We are proceeding with that, yes.

13 Q. All right.

14 Are you seeking to recover those costs
15 from the defendants?

16 MR. TENENBAUM: I have to object on
17 questions on future costs as being speculative.

18 MR. KEATING: Wait a minute.

19 He is speculating on whether it has to
20 be fenced. I will stipulate that it doesn't
21 have to be fenced if you want to do that. But,
22 if he doesn't, if he is going to say I want it
23 fenced, I might want costs and I might not.

24 MR. TENENBAUM: That is a matter of future

1 costs. If the fencing is done sometime in the
2 future, then the United States will come to the
3 court with the appropriate application for
4 approval of those costs, or perhaps it might
5 not. At that time you can ask that.

6 MR. KEATING: We have asked him about the
7 necessity of fencing. If then he has to come
8 back for a deposition, that would be ridiculous.

9 BY MR. KARAGANIS:

10 Q. Mr. Boice, let me lay a foundation.

11 Mr. Boice, when do you intend to fence
12 this site?

13 MR. TENENBAUM: Object to the form.

14 MR. KEATING: I have a question, Joe. The
15 fence might not have to be put up for a number
16 of years.

17 MR. KARAGANIS: That's what I am asking.

18 MR. KEATING: His counsel just said that.

19 MR. TENENBAUM: I did not say that.

20 BY MR. KARAGANIS:

21 Q. Let's let the witness answer.

22 When is the fence going up?

23 MR. KEATING: I am willing to stipulate to
24 it, though.

1 MR. TENENBAUM: I did not say that. You are
2 misstating what I said. I said that an
3 application to the court for future costs might
4 not be made.

5 BY MR. KARAGANIS:

6 Q. When is the fence going up, Mr. Boice?

7 A. Well, we have a contract.

8 MR. TENENBAUM: This is future costs.

9 A. Well, a contract for remedial design
10 that also includes maintaining and extending the
11 fence at Midco I.

12 BY MR. KARAGANIS:

13 Q. When does the contract call for the
14 extension and completion of the fence around
15 Midco I east of Blaine Road?

16 A. We have authorized the contractor to
17 proceed with that work. We are anticipating
18 some delays in getting approval for cutting off
19 Blaine Street. And if we can't, then I'm not
20 sure what we will do. We might just fence the
21 east portion separately.

22 Q. You have authorized the contractor to
23 proceed with the construction of a fence around
24 the site?

1 A. No, to initiate arrangements to put the
2 fence up.

3 Q. Is there a construction schedule with
4 the contract?

5 A. No, it hasn't been finished yet.

6 Q. The construction schedule hasn't been
7 finished?

8 A. No. We don't have any work planned for
9 conducting the work.

10 Q. But you do have a contract?

11 A. Yes.

12 Under the ARCS contract, they are
13 authorized to -- after we write up the contract,
14 they are authorized to initiate -- usually
15 initiate the work plan. In this case we gave
16 them authorization to proceed with the fence at
17 the same time as they are preparing the work
18 plan.

19 Q. Who did that?

20 A. Who did what?

21 Q. Who gave them the authorization?

22 When you say you, is that you?

23 A. Our contracting officer.

24 Q. Your contracting officer.

1 With respect to the contract, is that a
2 document?

3 A. The contract?

4 Q. The contract to do additional work at
5 Midco I.

6 A. There is an ARCS contract. That's an
7 overall national, region-wide contract.

8 Q. All right.

9 A. Besides that, then under that contract
10 we prepare work assignments.

11 Q. All right.

12 A. And those work assignments go through
13 an approval procedure, it has to go through some
14 of the supervisors.

15 Q. Okay.

16 A. It goes all the way through Val
17 Adamkus.

18 Q. Okay.

19 Is there a pending work assignment
20 proposal with respect to Midco I?

21 A. What is the work assignment proposal?

22 Q. You indicated there were work
23 assignments made on specific sites under a
24 overall regional contract; is that correct?

1 A. Yes.

2 I said that we prepared a work
3 assignment for remedial design that includes
4 maintaining and extending the fence at Midco I.

5 Q. All right.

6 Now, who is that work assignment to?

7 A. The contractor selected was Roy F.
8 Weston.

9 Q. This is the same contractor who served
10 as a technical consultant to you in the
11 preparation of the record of decision; is that
12 correct?

13 A. Yes. That was part of his previous
14 work assignment.

15 MR. TENENBAUM: I want to reiterate my
16 continuing objection to a question on future
17 costs that have not yet been specified to the
18 court.

19 BY MR. KARAGANIS:

20 Q. With respect to the work assignment, is
21 that in the form of a document?

22 A. The work assignment?

23 Q. The one that you have prepared for
24 remedial design.

1 A. Yes.

2 Q. And when was that prepared?

3 A. It was prepared about two months ago, a
4 month ago.

5 Q. Has that now been approved by the
6 regional administrator?

7 A. Yes.

8 The money was approved by the regional
9 administrator via an action memo.

10 Q. There is an action memo?

11 A. He doesn't actually review all the work
12 assignments, necessarily, but he approves the
13 obligation of the money.

14 Q. When was that approved and was there
15 such an action memo?

16 A. About a month ago, more than a month
17 ago.

18 Q. Well, more than a month ago.

19 Does that mean it was done in June or
20 was it done in May, what month?

21 A. It was probably in June.

22 Q. In June.

23 And what next has to take place in
24 order for Roy P. Weston to proceed with

1 construction of a fence?

2 A. I understand that they are going to
3 submit a work plan, and they have contacted some
4 contractors. And then we will have to get with
5 our legal people some how and find out if we can
6 cut off -- put it across Blaine Street.

7 Q. I see.

8 They are to submit a work plan. When
9 is the work plan due?

10 A. It should be due any time now. I don't
11 know exactly.

12 Q. Do you have a date?

13 Did you send them a letter or call them
14 on the phone and say please have the work plan
15 in by X date?

16 A. There's a schedule for them to submit
17 it, but I don't remember the exact date.

18 Q. Is that a written schedule?

19 A. Yes.

20 Q. And is that in August of 1990 to submit
21 the work plan?

22 A. I believe so, yes.

23 Q. What happens after the work plan is
24 submitted?

1 A. Well, I just told you, we review the
2 work plan and then we will get with our attorney
3 and see if we can make the arrangements to put
4 the fence across Blaine Street.

5 Q. And how will you go about putting the
6 fence across Blaine Street?

7 A. I don't know what you mean.

8 Q. Well, you say you have to get with your
9 attorneys to see if you can put a fence across
10 Blaine Street. I didn't know attorneys were
11 fence builders.

12 MR. TENENBAUM: Object to the form of the
13 question.

14 BY MR. KARAGANIS:

15 Q. What do attorneys have to do with it?

16 A. As you know, Blaine Street is a public
17 right-of-way. We have to make arrangements to
18 see if we can cut off that public right-of-way.
19 If we can't, then we will have to build the
20 fence in a different way.

21 Q. Does EPA have authority to cut off the
22 public right-of-way?

23 MR. TENENBAUM: Objection. Calls for a
24 conclusion. Also this line of questioning is

1 all hypothetical.

2 BY MR. KARAGANIS:

3 Q. Go ahead.

4 A. I don't know.

5 Q. Do you know, your request as part of
6 your Section 106 unilateral administrative order
7 for Midco I, did that request my client,
8 American Can Company, to put a fence around
9 Blaine Street on the eastern side of the site?

10 A. It included fencing the site. Yes. It
11 would have included restricting access to the
12 site.

13 Q. Do you know whether my client has the
14 legal authority to close off Blaine Street?

15 MR. TENENBAUM: Object to the form.

16 A. Do I know?

17 I am not a lawyer, but you should know
18 better than I do. I imagine they wouldn't have
19 that authority.

20 BY MR. KARAGANIS:

21 Q. All right.

22 Does your order call for them to close
23 off Blaine Street?

24 MR. TENENBAUM: Object to -- well --

1 A. No.

2 It calls for controlling the site.

3 Well, during the remedial design process, as
4 well as the remedial action, they have to
5 restrict site access.

6 BY MR. KARAGANIS:

7 Q. Again, so that I can properly advise my
8 client, what does the order specifically say
9 with regard to the fencing of the site at Midco
10 I?

11 A. Well, you could get out the order
12 yourself and read it. Generally, it says that
13 you will need to restrict access at the site.
14 And it didn't go into the specifics of whether
15 Blaine Street would be cut off or not.

16 Q. Why is it important to cut off Blaine
17 Street?

18 MR. TENENBAUM: Well, I am going to again
19 reiterate my continuing objection.

20 And I still object to questioning on
21 future costs as well.

22 MR. KARAGANIS: I am trying to find out what
23 we are supposed to do.

24 MR. TENENBAUM: I think the answer is to

1 trying to find out what --

2 MR. KARAGANIS: What we are supposed to do
3 under the order.

4 MR. TENENBAUM: I thought he already
5 indicated that.

6 MR. KARAGANIS: No.

7 He said to restrict access. I am
8 trying to find out what restrict access means so
9 I can advise my client.

10 Q. Does it mean cutting off Blaine Street?

11 MR. TENENBAUM: Is a deposition the
12 appropriate way to ask for an interpretation of
13 an order?

14 MR. KARAGANIS: The deposition is an
15 appropriate way.

16 I take it the position of the
17 government is that we are refusing to comply
18 with or are violating an order.

19 One of the things I am trying to find
20 out is what does the order require with respect
21 to site closure.

22 MR. TENENBAUM: You are asking for -- you
23 are asking him to interpret whether act A, B, or
24 C would comply with the order.

1 MR. KARAGANIS: No.

2 I am asking him to interpret what it is
3 about Blaine Street that makes Blaine Street
4 itself a cause or a need to protect against any
5 kind of endangerment. Why do we have to close
6 off Blaine Street.

7 MR. TENENBAUM: That is not endangerment.
8 It is not --

9 MR. KARAGANIS: It is, if it is we don't
10 have legal authority to do it, sir.

11 MR. TENENBAUM: The line of questioning is,
12 sounds like it is getting to imminent and
13 substantial endangerment.

14 MR. KARAGANIS: What it sounds like to me is
15 we have just discovered, among other things, one
16 reason why it is legally impossible to comply
17 with an order, if the order encompasses closing
18 off Blaine Street.

19 MR. TENENBAUM: The witness has testified.
20 He is not a lawyer, so he can't tell you what is
21 legally possible.

22 MR. KARAGANIS: Is it the government's
23 position that we have authority to close off
24 Blaine Street?

1 MR. TENENBAUM: We are not here to tell you
2 what the legal position of the United States is.

3 We are here to take factual testimony
4 from the witness.

5 MR. KARAGANIS: I am trying to find out what
6 it is, whether we will be considered in
7 violation or considered creating a hazard to
8 public health if we don't close off Blaine
9 Street.

10 We are trying to find out --

11 MR. TENENBAUM: Your client hasn't even
12 indicated in our view that it is willing to
13 comply with the orders yet. So that question is
14 premature.

15 MR. KARAGANIS: We have a trial in two
16 months.

17 We have indicated to you that we are
18 prepared to proceed with actions that involve
19 design work and preliminary work prior to trial.
20 One of the questions obviously that is involved
21 according to this witness' testimony in design
22 work is the fencing of the site. You are saying
23 that --

24 MR. TENENBAUM: I am not sure. He said that

1 is part of the design work.

2 MR. KARAGANIS: It is a work assignment for
3 remedial design. I think he said that was part
4 of the package.

5 A. Our work assignment to our contractor.

6 As far as the unilateral administrative
7 order, naturally in the statement of work we
8 can't go into the details of how, for example,
9 we say you prepare the remedial design for the
10 general remedial action. We can't get into the
11 details of how each step in the design will
12 proceed, in fact.

13 And the same with the remedial action.
14 To some degree the remedial action will depend
15 on the results of the remedial design and
16 subsequent documents.

17 BY MR. KARAGANIS:

18 Q. I take it fencing would have been part
19 of the remedial design work had you allowed the
20 defendants to proceed?

21 MR. TENENBAUM: Design of the fencing or
22 implementation of the fencing?

23 MR. KARAGANIS: No. The fencing
24 implementation would have been part of the

1 remedial design package.

2 Q. It is part of the Roy F. Weston
3 remedial design package, is it not, the actual
4 construction of the fencing?

5 MR. TENENBAUM: We are talking about
6 phraseology here, labeling here.

7 BY MR. KARAGANIS:

8 Q. Let's talk about physical construction
9 of the fencing. That is part of the remedial
10 design work assignment for Roy F. Weston, is it
11 not?

12 MR. TENENBAUM: I object as ambiguous.

13 A. Yes.

14 BY MR. KARAGANIS:

15 Q. All right.

16 Had you allowed the defendants to
17 proceed with their remedial design work, that
18 would have included construction of fencing,
19 would it not?

20 MR. TENENBAUM: How would he know what the
21 defendants were willing to do?

22 MR. KARAGANIS: Because it was part of the
23 order.

24 Q. The remedial design would have included

1 under the order construction of fencing, would
2 it not, Mr. Noice?

3 A. It wasn't specifically mentioned that
4 you would have to extend the site, the fencing,
5 fencing the site east of Blaine Street. But,
6 that is one thing I would have discussed.

7 I think I should note that it might be
8 possible, for example, if we can't cut off
9 Blaine Street just to fence the eastern portion.
10 That might have been what they did for the
11 remedial action, too.

12 Q. I am sorry. What who did for the
13 remedial action?

14 A. For removal action, I mean.

15 Q. To fence off just the portion of the
16 site that is east of Blaine Street?

17 A. Right.

18 Q. Leaving Blaine Street open?

19 A. Leave Blaine Street open. That might
20 be what happened.

21 Q. Would that be sufficient to protect
22 against an endangerment to public health?

23 MR. TENENBAUM: I have to object and
24 instruct the witness not to answer.

1 It is seeking a legal conclusion and
2 seeking discovery on a record issue.

3 BY MR. KARAGANIS:

4 Q. Other than your counsel's instruction
5 not to answer, do you have knowledge as to
6 whether leaving Blaine Street open would
7 represent an acceptable or unacceptable
8 endangerment to public health?

9 MR. TENENBAUM: Are you asking him whether
10 he would know the answer if I allowed him to
11 answer?

12 MR. KARAGANIS: That's correct.

13 A. It is hard to answer yes or no.

14 Q. What is your answer?

15 A. We know that --

16 MR. TENENBAUM: Wait a minute.

17 He just wants to know whether or not
18 you would be able to provide an answer to his
19 question if I didn't instruct you not to answer.
20 So the answer to that question is either yes,
21 you would, or no, you wouldn't, or you are not
22 sure.

23 A. It would probably take some study.

24

1 BY MR. KARAGANIS:

2 Q. After you studied it, do you think you
3 could give an answer to that question?

4 A. I think after I consulted with other
5 people, yes.

6 Q. I take it the sole reason for you are
7 not answering that question is your counsel's
8 instruction; is that right?

9 A. I'm following my counsel's
10 instructions.

11 Q. Mr. Boice, when did ATSDR suggest
12 fencing the site east of Blaine Street?

13 A. I don't remember, it would have been
14 maybe '88 or '89.

15 Q. Was that how the -- I am sorry.

16 At the lunch break I would also ask you
17 to bring with you the work assignment for
18 remedial design, the action memo of the
19 administrator and the schedule which
20 incorporates time lines or time deadlines for
21 submitting various components of the remedial
22 design, including the work plan that you
23 referred to.

24 While we are on that subject --

1 MR. TENENBAUM: We will take your request
2 under advisement.

3 MR. KARAGANIS: Mr. Tenenbaum, at one point
4 Mr. Finch had asked -- Mr. Boice had testified
5 with regard to a memorandum attached to a letter
6 by Mr. Harker, which related to the time which
7 it would take for pump and treat to achieve
8 cleanup action levels versus some other.

9 MR. TENENBAUM: That was provided to Mr.
10 Finch.

11 MR. KARAGANIS: That was provided for Mr.
12 Finch, along with the drafts of the FSS?

13 MR. TENENBAUM: There's a letter that Mr.
14 Finch requested with an attachment to it which
15 was provided to him. I don't know what draft
16 you are referring to.

17 BY MR. KARAGANIS:

18 Q. Let's go to ATSDR.

19 MR. TENENBAUM: Let me just for the record
20 state that I know it was shown to Mr. Finch.

21 I can't remember whether a copy -- we
22 made a copy or not or whether we gave him an
23 extra copy of it.

24 MR. KARAGANIS: I would like a copy of the

1 letter. I believe you said it was in your
2 testimony it was a letter from Mr. Barker with a
3 memorandum attached.

4 MR. TENENBAUM: From Mr. Ball you mean?

5 MR. KARAGANIS: I don't know who the
6 memorandum was from, though the transcript
7 indicates that there was a memorandum attached
8 that related to the time at which pump and treat
9 was to take place. It is one of the bases Mr.
10 Boice used to reach his conclusions with regard
11 to bad faith.

12 MR. TENENBAUM: I am not sure. We will try
13 and locate whatever it was we produced to Mr.
14 Finch, but I am not sure we are talking about
15 the same thing or not.

16 BY MR. KARAGANIS:

17 Q. Let's go on to ATSDR.

18 Mr. Boice, when did ATSDR get involved?

19 A. They have been involved since at least
20 1981, I believe.

21 Q. First of all, would you state for the
22 record what ATSDR is?

23 A. It stands for the Agency for Toxic
24 Substances and Disease Registry. The

1 predecessor agency was -- there was a
2 predecessor agency to that, that was involved as
3 early as 1981. I don't remember the name of the
4 Agency.

5 Q. When did the agency called ATSDR get
6 involved?

7 A. Well, when they became -- when they
8 were formed, the predecessor, what was it,
9 Atlanta, in Atlanta, the Center for Disease
10 Control --

11 Q. Yes.

12 A. -- was the predecessor agency.

13 Q. What did the Center for Disease Control
14 do at the site?

15 A. Prior to the Midco I removal, there
16 were complaints, health complaints by various --
17 by some citizens in Hessville, which is a
18 portion of the Hammond near Midco I.

19 One of them attributed some illnesses
20 to the site and ATSDR or I should say the Center
21 for Disease Control representative investigated
22 that and provided a response for EPA and for the
23 public.

24 Q. Is that response in the record?

1 A. I believe it is, yes.

2 Q. And can you identify where that
3 response is?

4 A. I would have to look through the
5 record.

6 Q. Directing your attention to Boice
7 Exhibit 3, which is the certification of various
8 indices to various administrative records.

9 Would you identify where the CDC
10 response is?

11 A. This is Midco I.

12 Q. Do you have a date on the document from
13 the index?

14 A. I wanted to look at the document to
15 first make sure it is the correct one. There
16 may have been more, too, I'm not sure.

17 Here is one dated June 21, 1982.

18 Q. June 21, '82.

19 Let's just stay with the first one.
20 When you say here is one, who is the author,
21 what is the agency?

22 A. The author is Gary Ford Stein, MD.

23 Q. Stein?

24 A. Yes.

1 Q. First name Gary?

2 A. Gary. Gary Ford Stein.

3 Q. All right.

4 A. He is a medical epidemiologist.

5 Q. All right.

6 A. In the Center for Environmental Health,
7 Center for Disease Control, Atlanta, Georgia.

8 Q. All right.

9 What agency is that part of?

10 A. Department of Public Health and Human
11 Services.

12 Q. That's the US Department of Health and
13 Human Services?

14 A. That's correct.

15 Q. Okay.

16 The title of the document?

17 A. There is no title. It is a letter.

18 Q. Does it refer to any kind of interim
19 health assessment?

20 A. Yes.

21 The first sentence states that this
22 letter constitutes an interim health assessment
23 for the Midco I site in Gary, Indiana.

24 Q. Now, we had copied, you were kind

1 enough to bring with you today the responses,
2 objections of the United States to the
3 interrogatories filed in 1985.

4 You indicated that that document
5 included a chronology of the documents leading
6 up to removal; is that right?

7 A. Yes.

8 Q. This is for Midco I.

9 Could you tell me what that chronology
10 is, and then identify the documents?

11 A. I would have to --

12 Q. It is right there.

13 A. Okay. The chronology is part of an
14 Exhibit C-I. Tabulation of USEPA activities at
15 the Midco I site.

16 Q. Okay.

17 You were going to identify the
18 documents that preceded the memorandum by Capper
19 that was at the administrator level?

20 A. The documents preparatory to the Midco
21 I removal action?

22 Q. That's correct.

23 A. This includes the fencing of the site?

24 Q. Yes. The various removal actions,

1 including the fencing.

2 A. Okay. There are several pages of
3 documents here.

4 Q. Let's go first to the pages that would
5 deal with the identification of the conditions
6 for which removal was required.

7 What documents relate to the
8 identification of conditions for which removal
9 action was required?

10 A. Well, then we might -- that is not just
11 only for preparatory, that is not only then
12 documents preparing for the removal action.
13 That would include all the documents including
14 analytical data and inspection reports prior to
15 the removal action.

16 Q. I take it removal action is not
17 something that is automatic, there has to be
18 some independent kind of factual basis for it;
19 is that right?

20 MR. TENENBAUM: Object, no foundation.

21 BY MR. KARAGANIS:

22 Q. You don't automatically order removal
23 action at every site, do you?

24 MR. TENENBAUM: Him personally?

1 MR. KARAGANIS: EPA.

2 MR. TENENBAUM: Objection. No foundation.
3 This witness is not designated to testify as to
4 removal actions.

5 BY MR. KARAGANIS:

6 Q. Go ahead.

7 A. I am not in the removal program.
8 Someone else would be better to testify
9 regarding the procedures for initiating removal
10 actions.

11 Q. What kind of documents?

12 A. Some type of documents are needed.
13 Yes.

14 Q. What documents are needed?

15 MR. TENENBAUM: Same objection.

16 A. So you are not following up on this
17 question? You are changing your question?

18 BY MR. KARAGANIS:

19 Q. Let's take it, at the regional
20 administrator level.

21 What documents go to the regional
22 administrator that say this is why we need
23 removal, and this is the removal that is needed?

24 MR. TENENBAUM: Same objection.

1 This witness has testified that he is
2 not the person to testify about removal.

3 BY MR. KARAGANIS:

4 Q. Go ahead.

5 A. I can point out which documents were
6 generated for Midco I.

7 Q. Please.

8 A. But, as far as general procedures, I'm
9 not that knowledgeable about general procedures.

10 Q. All right.

11 What documents were generated --

12 MR. TENENBAUM: Further, I would also point
13 out there has been no foundation established
14 that you the United States is seeking costs
15 relating to these, for these pre-1985
16 activities.

17 MR. KARAGANIS: One of the things that will
18 be established is the United States is seeking
19 double costs here, because you have already had
20 the action and already recovered monies from us
21 and, therefore, the United States is not only in
22 violation of the statute but is in violation of
23 the consent decree.

24 MR. KEATING: And where is the fence?

1 MR. KARAGANIS: Where is the fence that we
2 paid for?

3 MR. KEATING: Where is that fence?

4 BY MR. KARAGANIS:

5 Q. Go ahead, Mr. Boice, please identify --

6 MR. TENENBAUM: You have not established any
7 foundation for the self-serving statement you
8 just made.

9 There's no foundation for any of these
10 questions. And we are proceeding down a path of
11 questions that purportedly have something to do
12 with cost, and you haven't even established
13 whether or not this is part of the costs that
14 are being sought.

15 BY MR. KARAGANIS:

16 Q. Go ahead, Mr. Boice.

17 MR. TENENBAUM: I am going to have to cut it
18 off at some point. I will let it go on for a
19 while.

20 A. Okay.

21 My understanding of the request is that
22 you want documents relating to or leading up to
23 the removal actions that had to do with approval
24 of the removal action?

1 BY MR. KARAGANIS:

2 Q. Yes.

3 A. Okay.

4 I can't answer it without looking at
5 the documents. In some cases I could list the
6 ones that look like they are probably related to
7 the approval of the action.

8 Q. Why don't you do that first, list the
9 ones that are probably related.

10 MR. TENENBAUM: Same continuing objection as
11 the other objections.

12 A. Regarding the fence installation,
13 there's an April 1, '82 telephone memorandum
14 from James Rogers, US Coast Guard.

15 BY MR. KARAGANIS:

16 Q. What page are you on of the C-I
17 exhibit?

18 A. This one, where it says 6-2 to 9-81.

19 Q. 6-2 to 9. I am sorry. What is the
20 page prior to that page, is there a numbered
21 page?

22 A. No. Oh, the previous one is numbered
23 4.

24 Q. All right.

1 A. I am saying these may be related to the
2 approval.

3 Q. Right. I understand.

4 That relates to the installing of the
5 fence around the area?

6 A. Yes.

7 Q. Go ahead.

8 A. There's an April 13, 1982 letter from
9 George Matany.

10 Q. April 13, '82.

11 Are these documents in chronological
12 order?

13 A. On this tabulation they are, yes.

14 Q. So I simply look for --

15 A. They are under this June 2 to 9, '81
16 action for fence installation.

17 Q. All right.

18 So if I am reading this correctly, the
19 other documents that relate to the fence
20 installation are shown under the heading,
21 "documents generated;" is that right?

22 A. Yes.

23 Q. Okay.

24 A. I said that already.

1 There's a May 7, '81 memo from
2 Commander Ninth Coast Guard District.

3 Q. I can read that, Mr. Boice. That
4 relates to fences.

5 Let's go on and talk about the other
6 actions, putting on of what you called the
7 temporary clay cover.

8 A. You mean removal of the waste?

9 Q. Removal of the waste and the clay
10 cover.

11 What else was there?

12 MR. TENENBAUM: Same continuing objection.

13 A. Removal of the top one foot or so of
14 highly contaminated soils, surface soils.

15 BY MR. KARAGANIS:

16 Q. Right.

17 What documents relate to that?

18 A. Okay. There is a June 11, 1981 memo
19 from Scott McCone, M-c-C-o-n-e.

20 Q. All right.

21 A. There is a July 23, 1981 memo from Greg
22 Vanderlaan.

23 Q. Okay.

24 Is that memo in the -- would you check

1 the administrative record, please?

2 A. What is the question?

3 Q. Yes.

4 Is the 7-23-81 memo from Vanderlaan
5 regarding, I take it, the surface removal,
6 implementation of surface removal and
7 attachments, is that in the record, the
8 so-called record or administrative records and
9 indices that you have for the current ROD's or
10 106 orders?

11 A. No, it isn't. But, it was produced to
12 the defendants.

13 Q. When was it produced to the defendants?

14 A. I believe it would have been in 1985.

15 Q. Okay.

16 Is there a reason why it is not in this
17 record?

18 MR. TENENBAUM: Objection. Seeks to take
19 discover into compilation of the administrative
20 record.

21 I will have to instruct the witness not
22 to answer.

23 BY MR. KARAGANIS:

24 Q. Mr. Boice, I take it the 7-23-81 memo

1 by Mr. Vanderlaan relates to the amount and
2 degree of soil removal, does it not?

3 MR. TENENBAUM: Objection. No foundation.

4 A. It appears to have some relation to
5 that. Yes. But, I would have to read the
6 letter itself to confirm that.

7 BY MR. KARAGANIS:

8 Q. What is the next document that relates
9 to the actions to be taken to address health
10 hazards in the removal action?

11 A. What did you say?

12 Q. Would you repeat the question.

13 (The record was read.)

14 MR. TENENBAUM: Same continuing objection.

15 You are asking the witness now to
16 interpret a list of documents that were prepared
17 before he worked at the Agency, and draw all
18 sorts of inferences from them. I don't think
19 that is a proper question.

20 BY MR. KARAGANIS:

21 Q. Go ahead.

22 MR. KEATING: Excuse me.

23 Do you have any idea of when you are
24 going to break? I am not asking you to break.

1 I just want to know if you have any idea.

2 MR. KARAGANIS: I would like to go to one
3 o'clock.

4 MR. KEATING: Then go to two?

5 MR. KARAGANIS: Yes.

6 (Discussion had off the record.)

7 Q. Go ahead.

8 A. There is a November 3, 1981 inspection
9 report by Beverly Rush.

10 Q. Where is that, what page is that on?

11 A. 14.

12 MR. TENENBAUM: I don't see why -- you could
13 read the list and look at the documents
14 yourself.

15 MR. KARAGANIS: Excuse me.

16 MR. TENENBAUM: He didn't write these
17 documents.

18 MR. KARAGANIS: Mr. Tenenbaum, I am trying
19 to find out which of several thousand documents
20 relate to public health protection.

21 And we are making some progress, if you
22 will continue to allow a search for truth in
23 this matter. I am trying to find out what
24 documents relate to public health protection

1 considerations.

2 MR. TENENBAUM: This witness is not -- did
3 not write those documents. So I don't know what
4 more you expect.

5 MR. KARAGANIS: The witness put together the
6 so-called administrative records in this case.

7 MR. TENENBAUM: I am going to object.

8 BY MR. KARAGANIS:

9 Q. Mr. Boice, the Rush memorandum of
10 11-3-81, is that in the administrative record
11 which you have certified in Boice Deposition
12 Exhibit No. 3?

13 MR. TENENBAUM: Index?

14 MR. KARAGANIS: The index.

15 A. No, it is not, but it was produced to
16 you.

17 Q. What is the next document that relates
18 to public health protection as it relates to
19 removal?

20 A. Well, I'm not saying this relates to
21 that, but it appears to.

22 Q. Okay.

23 A. There is an August 17, 1981 memo from
24 Greg Vanderlaan.

1 Q. That's the one that relates to purpose,
2 implement surface removal; is that right?

3 A. Purpose, yes.

4 Q. All right.

5 MR. TENENBAUM: You are asking what it says
6 there?

7 MR. KARAGANIS: That is what it says there,
8 yes, on the exhibit.

9 Q. Is that document in the administrative
10 records that you certified, the indices that are
11 in Boice Deposition Exhibit No. 3?

12 A. No, but it was produced to the
13 defendants.

14 Q. Again, with respect to the 11-3-81 Rush
15 memorandum and the 8-17-81 Vanderlaan
16 memorandum, can you tell me what the reasons
17 were for not including those documents in the
18 indices to the administrative record contained
19 in Boice Deposition Exhibit 3?

20 MR. TENENBAUM: Same objection and
21 instruction not to answer.

22 BY MR. KARAGANIS:

23 Q. If Mr. Tenenbaum, if your counsel had
24 not instructed you or had not given you an

1 instruction not to answer, would you be able to
2 answer those questions?

3 A. Yes.

4 Q. Was the decision not to include them in
5 the record your decision?

6 MR. TENENBAUM: I have to object.

7 To the extent that the question seeks
8 to take discovery on the process for compiling
9 the record, I have to instruct the witness not
10 to answer.

11 Now, if the question is rephrased or it
12 is limited to whether this witness certified the
13 administrative record index, then that might be
14 something he can answer. But, as to the whole
15 process involved in deciding with respect to
16 what goes into the record, that I will have to
17 instruct the witness not to answer.

18 MR. KARAGANIS: Please, with respect to this
19 question, please tell me if you are instructing
20 the witness not to answer?

21 MR. TENENBAUM: As phrased I will have to
22 instruct the witness not to answer, but there
23 might be another way of rephrasing it.

24

1 BY MR. KARAGANIS:

2 Q. Mr. Boice, had your counsel not
3 instructed you to refuse to answer, would you be
4 able to answer that question?

5 A. Yes.

6 Q. Mr. Boice, in preparing your
7 certification, which is on the the front page of
8 Boice Deposition Exhibit No. 3, did you decide
9 not to include the 7-23-81 Vanderlaan memo, the
10 11-3-81 Kush memo and the 8-1781 Vanderlaan
11 memo?

12 MR. TENENBAUM: I am going to have to again
13 object and instruct the witness not to answer.

14 If you want to ask the witness, as you
15 may I have already done, whether they are in the
16 record, I have allowed that to be answered.

17 If you want to ask the witness whether
18 he has certified this document, as you probably
19 did in your other round of questioning, that
20 would be all right.

21 BY MR. KARAGANIS:

22 Q. Again, Mr. Boice, had your counsel not
23 instructed you to refuse to answer, would you be
24 able to answer that last question?

1 A. Yes.

2 Q. Mr. Boice, were you aware of the
3 existence of the 7-23-81 Vanderlaan memorandum,
4 the 11-3-81 Rush memorandum, and the 8-17-81
5 Vanderlaan memorandum at the time you prepared
6 the certification that is in Boice Deposition
7 Exhibit No. 3?

8 MR. TENENBAUM: Same objection. You can
9 answer if you know the answer.

10 A. Yes.

11 MR. TENENBAUM: Same objection.

12 BY MR. KARAGANIS:

13 Q. What is the next document that you
14 believe is probably related to the removal
15 action and the protection of public health as it
16 relates to removal?

17 MR. TENENBAUM: You mean from his review of
18 the index without looking at the documents?

19 MR. KARAGANIS: Yes.

20 MR. TENENBAUM: Okay.

21 Again, same continuing objection.

22 I would also add on this record issue
23 that you have brought up, if you believe that
24 there are any documents, these or others, that

1 belong in the record, please send us a letter or
2 otherwise inform us, and we will evaluate your
3 position on that.

4 MR. KARAGANIS: I will tell you, Mr.
5 Tenenbaum, you have made this process very
6 laborious for me to try and find out which
7 documents EPA deliberately excluded from the
8 record.

9 Had you simply prepared a list saying
10 these are the documents that are not included in
11 the record -- we could provide you with such a
12 letter.

13 I now have to go through document by
14 document in this deposition to find out what
15 wasn't included. There is no document prepared
16 by EPA that says the following documents
17 relating to Midco I have not been included in
18 the certified administrative record. Had you
19 done so, it would have made this process an
20 awfully lot easier.

21 MR. TENENBAUM: I think that we have done
22 all that we are required to do with respect to
23 the administrative record.

24 MR. KARAGANIS: Don't complain to me about

1 the laboriousness of the process.

2 MR. TENENBAUM: These documents have been
3 available to you and your clients for many, many
4 years. If you think one of them belongs in the
5 administrative record, if we agree, that's
6 easily remedied.

7 BY MR. KARAGANIS:

8 Q. Mr. Boice, would you proceed, please,
9 with the Exhibit C-I to the government's answers
10 to interrogatories, tell me which documents
11 probably relate, based on your examination of
12 the index, to the question of removal and the
13 need to protect public health at the removal
14 stage for Midco I?

15 A. There is a December 16, '81 memorandum
16 from George Madny and a December 31, '81 memo
17 from George Madny.

18 Q. What page are you on?

19 A. Page 21.

20 Q. I am sorry. What were the dates,
21 12-16-81?

22 A. Yes. And 12-31-81.

23 Q. Both from Madny?

24 A. Correct.

1 Q. Okay.

2 Are the 12-16-81 and the 12-31
3 memorandums by Madny contained in the certified
4 record indices of Boice Deposition Exhibit No.
5 3?

6 A. No.

7 Q. Based again on Exhibit C-I, what is the
8 next document that relates to removal actions at
9 Midco I as they relate to protection of the
10 public health?

11 A. Okay.

12 Q. Before you go through that list,
13 directing your attention again to the group on
14 page 21 of Exhibit C, where it says the period
15 2-6-82 to 7-8-82, is that the period of actual
16 removal?

17 A. That is my understanding, yes.

18 Q. Okay.

19 MR. TENENBAUM: Same objection.

20 This witness is not designated to
21 testify on removal.

22 BY MR. KARAGANIS:

23 Q. All right.

24 Go on, please.

1 A. There is a January 6, 1982 memo from
2 George Madny.

3 Q. And is the January 6, 1982 memo from
4 George Madny in the various indices of the
5 administrative record certified by you in Boice
6 Deposition Exhibit No. 3?

7 A. No.

8 Q. What is the next document that relates
9 to removal activities and protection of the
10 public health at Midco I?

11 A. There's a March 12, 1982 memorandum
12 from Henry Van Cleve, March 12, '82, rather.

13 Q. That's on page 22 of Exhibit C?

14 A. Yes.

15 Q. Is the March 2, 1982 memorandum from
16 Mr. Van Cleve contained in the administrative
17 record certified by you in Boice Deposition
18 Exhibit No. 3?

19 A. No.

20 Q. What is the next document?

21 A. There is a November 17, 1981 memo from
22 George Madny.

23 Q. And is that 11-17-1981 memo in the
24 administrative records or indices certified by

1 you in Boice Deposition Exhibit No. 3?

2 A. No.

3 Q. What is the next document that relates
4 to removal action at Midco I and the protection
5 of public health?

6 A. There is an October 21, 1981 memo
7 from -- again, these are -- I presume these are
8 related to -- at least they might be, but I am
9 not sure.

10 Q. I take it your testimony is that they
11 likely are, but you would have to confirm it by
12 looking at the original documents; isn't that
13 right?

14 A. Right. It is likely that some of these
15 have to do with documentation of the site
16 conditions.

17 Q. The site conditions and the steps
18 necessary to take removal action to protect
19 public health, isn't that right?

20 A. Uh-hum.

21 MR. TENENBAUM: Object.

22 BY MR. KARAGANIS:

23 Q. When you say uh-hum, does that mean
24 yes?

1 A. Yes. Although, if you bring in the
2 removal actions themselves, then there is more
3 documents on that.

4 Q. All right.

5 Let's take the removal actions
6 themselves.

7 A. Okay.

8 Before we go back, there's an October
9 21, 1981 memo from Basil G. Constantelos.

10 Q. What page is that referred to on?

11 A. 22. October 21, '81.

12 Q. Is that memorandum, the October 21,
13 1981 memorandum, in the certified administrative
14 record indices in Boice deposition Exhibit No.
15 3?

16 A. No.

17 Q. Now, these documents that you have been
18 testifying to relate to actions that are
19 necessary to conduct removal, is that right?

20 MR. TENENBAUM: Objection.

21 A. My understanding is probably some of
22 them relate to the actions or approvals or
23 documentation of site conditions that would be
24 necessary.

1 BY MR. KARAGANIS:

2 Q. All right.

3 Removal is done as a measure to protect
4 public health, is it not?

5 MR. TENENBAUM: Object to the form. No
6 foundation.

7 BY MR. KARAGANIS:

8 Q. Go ahead.

9 MR. TENENBAUM: Calls for legal conclusion.

10 A. Yes.

11 BY MR. KARAGANIS:

12 Q. Next document.

13 A. Well, that brings us to the March 30,
14 '82 memo from William Hedeman and the April 1,
15 1982 memo from Christopher Capper.

16 Q. Okay.

17 But those memos ask for further
18 authorization, do they not, to do more?

19 A. I would have to read it.

20 Q. There they are, I believe.

21 A. The March 30, 1982 memo from William
22 Hedeman contains a request for additional
23 authorization for additional monies to complete
24 the remedial action and a summary of the site

1 conditions at that point.

2 And this was approved by Christopher
3 Capper by his signature.

4 Q. You indicated there was a subsequent
5 memo from Daniel?

6 A. The memo from Christopher Capper
7 transmitted that to Daniel, and he signed that.

8 Q. So the two memos, the Hedeman memo and
9 the Capper memo, are related to a request to do
10 additional work, isn't that right?

11 MR. TENENBAUM: Objection.

12 A. Apparently. Yes.

13 BY MR. KARAGANIS:

14 Q. So subsequent to those memos,
15 subsequent to April 1, '82, we know based on
16 page 21 of Exhibit C, that the work went on
17 until July 8, 1982; isn't that right?

18 MR. TENENBAUM: Objection. The witness
19 wasn't working for EPA at that time.

20 A. Based on the documentation, that would
21 appear to be correct, yes.

22 BY MR. KARAGANIS:

23 Q. Would you look again at Exhibit C-I.

24 Are there any documents that relate to

1 either evaluating the work as it is being done
2 or evaluating the work after it is done?

3 I am now talking about the removal work
4 at Midco I, in 1982.

5 A. Yes.

6 O. As to protection of the public health.

7 MR. TENENBAUM: Do you want him to read all
8 the documents?

9 MR. KARAGANIS: No.

10 I am asking him to look at the index
11 and identify documents that likely relate to
12 that subject.

13 MR. TENENBAUM: I don't know how he can do
14 that without reading the documents.

15 But, if you want to answer as to which
16 ones might possibly, go ahead. But, I don't see
17 how the index could tell him whether it is
18 likely or not.

19 MR. KARAGANIS: The index has a summary in
20 it, which says what the purpose of the document
21 was, Mr. Tenenbaum. If you look over your
22 witness' shoulder, you will find that there are
23 documents that appear to relate to the subjects
24 I am asking about.

1 MR. TENENBAUM: I will let him try and say
2 what might do so, but I object to the likely
3 characterization. He can't tell that without
4 reading the document.

5 MR. KARAGANIS: All right.

6 A. As far as documents that record what
7 was being done at the site and the progress
8 being done, there are a lot of documents on that
9 and there's a final, maybe one or two documents
10 that summarize what was done.

11 Q. Where are those documents?

12 A. I am not sure whether they address what
13 you have referred to as the risks.

14 Q. I didn't say risks. I said public
15 health protection.

16 A. The public health protection.

17 I think that is addressed in the
18 planning documents. They identify a certain
19 risk. Then they make a plan to address the
20 risks that have to be addressed on a
21 time-critical basis. Then they implement that
22 plan.

23 That's what most of the documents, the
24 progress reports are on that.

1 Q. What is the planning document to which
2 you refer?

3 A. The ones I just went over.

4 Q. The numbered or the dated documents
5 that you referred to?

6 A. Yes. I am not sure that's all of them.
7 There might be for example, there was a -- I
8 can't find it right now.

9 Q. You can't find what right now?

10 A. That's all the documentation that I was
11 able to identify, I have already gone over.

12 Q. Is there a document that evaluates, for
13 example, how much soil removal has to take place
14 to protect the public health?

15 MR. TENENBAUM: Same continuing objection.

16 A. There are planning documents which
17 identify, have cost estimates regarding how much
18 it is going to cost.

19 BY MR. KARAGANIS:

20 Q. Directing your attention to page 26 of
21 Exhibit C-I, the dates 5-24 to 5-26, '82.

22 A. Uh-hum.

23 Q. Do those documents relate to the amount
24 of soil that has to be removed to protect public

1 health?

2 MR. TENENBAUM: Hold it a second. The
3 amount.

4 Where do you see anything about public
5 health in that listing?

6 A. Not in the listing, no.

7 BY MR. KARAGANIS:

8 Q. Mr. Boice --

9 MR. TENENBAUM: We will have to read the
10 document.

11 MR. KARAGANIS: Let's get the document out.
12 The purpose, the list says --

13 MR. TENENBAUM: The document speaks for
14 itself. He didn't write the document.

15 BY MR. KARAGANIS:

16 Q. Mr. Boice, the document says on C-I
17 that the purpose of this period of time -- there
18 are two documents here -- is to determine cost
19 effective extent of soil removal action.

20 Do you know what the term cost
21 effective extent of soil removal action is
22 about?

23 A. Do I know what cost effective means you
24 mean?

1 Q. Yes. With regard to the subject of
2 soil removal.

3 A. Yes.

4 Cost effective. You have got to --
5 considering the abilities of the removal
6 program, they have got both time and budgetary
7 limits on how much they can spend.

8 Q. Okay.

9 A. That would be how much they could -- my
10 assumption is that it would be how much they
11 could remove considering their budgetary
12 constraints.

13 Q. Okay.

14 Does that also relate to how much they
15 can remove considering public health concern?

16 A. Well, they wanted to remove --

17 Under the removal program, they
18 generally remove as much of the public health
19 threat as it can, under their budgetary and time
20 constraints.

21 Q. All right.

22 They actually went back and got
23 ceilings removed, budget ceilings removed, to do
24 additional work, did they not?

1 MR. TENENBAUM: If you know.

2 A. That is what the Capper memo was for,
3 yes.

4 BY MR. KARAGANIS:

5 Q. All right.

6 Do you have the documents that come
7 from the -- I am sorry.

8 The documents that are listed in 5-24
9 to 5-26-82 in Exhibit C-I, page 26, are they in
10 the administrative record?

11 A. Yes.

12 Q. And where are they listed in the
13 administrative record?

14 I take it when you are looking for
15 those documents, you are referring to the 6-3-84
16 memorandum from George R. Prince and the 6-25-84
17 interim report by George R. Prince?

18 A. Yes.

19 A. It appears that those particular
20 documents aren't in the record. But, the
21 analytical results are summarized in the
22 remedial investigation.

23 Q. But the reports and memoranda
24 themselves are not in the record that you

1 certified or records that you certified in Boice
2 Deposition Exhibit No. 3, isn't that correct?

3 A. I can't find them. That's right.

4 Q. Now, after the completion of the
5 removal action, is there an evaluation made as
6 to the completeness or effectiveness of the
7 removal action?

8 MR. TENENBAUM: Same objection. You may
9 answer if you know the answer.

10 A. There are some documents that summarize
11 what was done and they might mention something
12 about the effectiveness of the removal action.

13 BY MR. KARAGANIS:

14 Q. Okay.

15 What documents are those?

16 A. Okay.

17 There's a cleanup final report by Bob
18 Bowen dated July 19, 1982.

19 Q. Okay.

20 That is from whom to whom, Rowden is
21 the recipient, who is the author?

22 A. TATC, that is the technical assistant
23 team contractor.

24 Q. Is that document in the record?

1 A. Yes.

2 Q. Would you find that for me, please?

3 Q. Did you say TAT or TRT?

4 TAT is technical assistance team, isn't
5 it?

6 A. Oh, right. Technical assistance team,
7 right. Sorry about that.

8 Q. Did you find it?

9 A. Yes.

10 Q. I direct your attention to the
11 memorandum of July 19, 1982 by Mr. McCone, the
12 technical assistance team via Mr. Scott McCone.
13 the acronym TATL, does the "L" stand
14 for leader?

15 A. I don't know.

16 Q. This document is located in the
17 administrative record for Midco I, USEPA
18 administrative record index Midco I, September
19 1987, Part II of VI.

20 Directing your attention to that
21 document, Mr. Boice.

22 A. Yes.

23 Q. It refers to several attachments,
24 several appendices.

1 A. Uh-hum.

2 Q. Those appendices are not with the
3 document. Can you tell me where those
4 appendices are?

5 A. Okay. Okay.

6 Appendix A is sampling procedures for
7 air monitoring.

8 Q. Where is it?

9 A. I don't know where that is.

10 Q. Is it in the record that you have
11 certified in Boice Deposition Exhibit No. 3?

12 A. No.

13 Q. Okay.

14 Where is Appendix B?

15 A. Okay.

16 That is the preliminary report by ERT
17 on the extent of contamination. What we have in
18 the record not the preliminary report, we have
19 the final report dated March 1983.

20 Q. And where is that in the record?

21 A. It is under the date 3-83, extent of
22 contamination survey.

23 Q. Who is the author?

24 A. The author is environmental response

1 team.

2 Q. Is that entitled summary of extent of
3 contamination?

4 A. The actual title is extent of
5 contamination survey, but they probably said
6 summary of contamination.

7 Q. All right.

8 So the data that is in the preliminary
9 report itself is not in the record that you have
10 certified; is that correct?

11 A. That's correct.

12 Q. How about Appendix C?

13 A. Appendix C is summary of questions
14 raised at a public meeting. I'm not sure where
15 those are. They might be in the record some
16 place.

17 Q. Would you see, please?

18 A. Those are contained in a memo from
19 Scott McCone dated July 8, 1982, which is in the
20 record.

21 Q. 7-8-82?

22 A. Uh-hum. Yes. At least it appears to
23 be, I should say.

24 Yes. It says the following questions

1 were asked by local residents, so that is
2 probably it.

3 Q. Are you sure or do you think it is
4 probably it?

5 A. I think it is probably it.

6 Q. Okay.

7 May I see it, please, the document that
8 you say is the McCone memo?

9 Okay. Now,

10 A. Do you want Appendix D?

11 Q. Yes.

12 A. Appendix D are newspaper articles
13 covering the Midco I cleanup.

14 Q. Are they in the record, the
15 certification of the administrative records?

16 A. There are newspaper articles in the
17 record. I'm not sure whether they are the ones
18 attached that would have been attached to this
19 memorandum or not.

20 Q. There are newspaper articles in the
21 record.

22 But, you can't be certain whether the
23 articles that are referred to in Appendix D of
24 the July 19, 1982 TAT memo to Bowen are included

1 in the record; is that correct?

2 A. That's correct.

3 Q. Directing your attention to again
4 Exhibit C-I, and particularly I am looking for
5 documents that would relate to review and
6 evaluate the effect of the removal action in
7 protecting public health.

8 In other words, did someone at EPA
9 examine the work that has been done and make a
10 determination that the goals have been achieved
11 satisfactorily?

12 MR. TENENBAUM: Can you read that back?

13 (The question was read.)

14 Same continuing objection.

15 If you can find documents that might
16 have any bearing on that question, whatever it
17 means, you can point them out.

18 A. Under the removal program as I said
19 before, they addressed the threat to the extent
20 they are capable of, within the limits of that
21 program --

22 MR. TENENBAUM: He wanted you to find
23 documents.

24 A. I think the only document I could think

1 of would be this extent of contamination survey
2 by ERT, which might address that issue.

3 BY MR. KARAGANIS:

4 Q. The extent of contamination survey
5 final report is what date, 3-3-83?

6 A. This isn't EPA's document.

7 Q. What are you referring to?

8 A. There is a report by ENRAC, called
9 final status report for the cleanup. It
10 explains everything that was removed.

11 Q. All right.

12 A. And summarizes the action.

13 Q. Mr. Boice, I presume that within the
14 limits of dollars and time, there is someone
15 within EPA who determines how much soil should
16 be removed to protect the public health?

17 MR. TENENBAUM: As part of the removal
18 action?

19 MR. KARAGANIS: As part of the removal
20 action.

21 MR. TENENBAUM: This removal action?

22 MR. KARAGANIS: Yes.

23 Q. Is that correct?

24 MR. TENENBAUM: He wants to know, tell me if

1 it is correct,, that I am stating your question
2 correctly. I think he is asking who at EPA
3 determined in the Midco I removal how much soil
4 to remove; is that right?

5 MR. KARAGANIS: So as to protect the public
6 health.

7 A. That would have been determined by
8 Beverly Rush.

9 Q. Okay.
10 What was her role?

11 A. She was the on scene coordinator.

12 There might be some information on that
13 in some of the documents that were produced to
14 you in 1985, for example, the daily summary
15 sheets, Midco daily logs.

16 Q. Which daily summary sheets?

17 A. What are you referring to?

18 A. For example on page 24.

19 Q. Let's not go, for example. Let's go to
20 the exact pages and the exact documents to which
21 you are referring.

22 A. I was referring to page 24.

23 Q. Okay.

24 A. Then on page 22, there is pol reps.

1 Q. What are pol reps?

2 A. They are updates on the status of the
3 removal action, that are prepared in the field
4 and transmitted to headquarters.

5 Q. They are relating to air pollution or
6 they are reports with respect to removal
7 actions?

8 A. They are reports on the removal action.

9 Q. And with respect to the reports on the
10 removal action, which is located on page 22 of
11 Exhibit C-I of the government's answers to
12 interrogatories, namely pol reps 5, 6, 7, 8, 9,
13 10, and 11; are those documents in the materials
14 you have certified as being part of the
15 administrative record regarding -- part of any
16 of the administrative record indices in Boice
17 Deposition Exhibit No. 3?

18 A. No.

19 Q. Those pol reps would be reports by
20 Beverly Rush, is that right, as on scene
21 coordinator?

22 A. Probably. I'm not sure.

23 Q. But they would relate to the progress
24 of the work and the amount of work needed to

1 protect the public health under the removal; is
2 that right?

3 MR. TENENBAUM: Do you want him to read
4 these documents to answer that?

5 MR. KARAGANIS: If he knows.

6 A. They are just status reports on the
7 removal action.

8 Q. They are status reports.

9 You indicated that the on scene
10 coordinator makes the determination as to how
11 much soil should be removed, isn't that right?

12 MR. TENENBAUM: Makes the determination or
13 has knowledge about it?

14 MR. KARAGANIS: I thought you said made the
15 determination.

16 MR. TENENBAUM: I thought the question was,
17 though, who had knowledge.

18 MR. KARAGANIS: No.

19 Who had the responsibility at the EPA
20 of determining how much soil should be removed
21 in protecting the public health in the removal
22 action.

23 MR. TENENBAUM: I didn't understand the
24 question. If you were asking as to the

1 decisional process of the Agency, I would have
2 objected.

3 MR. KARAGANIS: I am talking about who said
4 remove this amount. This isn't a decisional
5 process. It is a technical question as to how
6 many yards of soil need to be removed to protect
7 public health.

8 It is a scientific question. It has
9 nothing to do with administrative process.

10 MR. TENENBAUM: The administrative
11 decision-making process that supports the
12 removal action is an administrative process.

13 Now, if you want to know who made --
14 who at the Agency made the determination to
15 authorize the removal action, including the
16 amount of soil, then he can tell you that, if he
17 knows. Or, if you want to ask who might have
18 knowledge about the amount of soil that was
19 removed.

20 MR. KARAGANIS: Okay.

21 Q. Who made the determination, Mr. Boice,
22 as to the amount of soil that should be removed?

23 MR. TENENBAUM: Who for the Agency made the
24 final determination?

1 MR. KARAGANIS: Yes.

2 MR. TENENBAUM: Do you know?

3 A. I said Beverly Rush before. Subject to
4 the amount of funds available that had been
5 obligated, she made the decision how much soil
6 should be removed.

7 BY MR. KARAGANIS:

8 Q. All right.

9 So from the standpoint of the technical
10 decision to protecting the public health subject
11 to the funding limitations you mentioned --

12 MR. TENENBAUM: He didn't say anything about
13 public health.

14 BY MR. KARAGANIS:

15 Q. Mr. Boice, I take it Beverly Rush, one
16 of her responsibilities was to see that the
17 public health was protected, was it not?

18 MR. TENENBAUM: I don't know if he knows
19 what her responsibilities were or were not.

20 MR. KARAGANIS: He better know what her
21 responsibilities were.

22 MR. TENENBAUM: Why? He is not the removal
23 person. He is not the witness on removal.

24

1 BY MR. KARAGANIS:

2 Q. Go ahead, Mr. Boice.

3 MR. TENENBAUM: You can only answer what you
4 know. Do not speculate.

5 If you know what her responsibilities
6 were, try and answer. If you don't know, then
7 you have to refer them to her.

8 Do you know what her responsibilities
9 were?

10 A. Her responsibilities were to implement
11 the cleanup activities at the Midco I site.

12 And as far as evaluation of public
13 risk, that is -- really, I am not the one to
14 testify to that. But, in the removal program,
15 it is a very rough evaluation compared in the
16 remedial program.

17 BY MR. KARAGANIS:

18 Q. Mr. Boice, I didn't ask you whether it
19 was rough or whatever.

20 Is it not true that Ms. Rush, as the on
21 scene coordinator, has among her
22 responsibilities protection of public health at
23 the Midco I site?

24 MR. TENENBAUM: He can testify as to what he

1 knows.

2 MR. KARAGANIS: If you know.

3 MR. TENENBAUM: But, he can try to explain
4 what he knows. I don't think it is proper if
5 you criticize him for trying to explain what he
6 knows. There is nothing wrong with what you
7 just said. If you have anything, you may add to
8 it.

9 MR. KARAGANIS: Mr. Tenenbaum, please don't
10 instruct the witness.

11 MR. TENENBAUM: I am not instructing the
12 witness. I am protecting the witness against
13 some of the improper statements you are making.

14 Go ahead.

15 A. I don't know whether that's exactly in
16 her position description, I am not sure.

17 BY MR. KARAGANIS:

18 Q. Mr. Boice, at the sites that you work
19 on as remedial project manager, do you work with
20 the on scene coordinator?

21 A. To some degree, yes.

22 Q. What are the differences in
23 responsibilities between the on scene
24 coordinator and the remedial project manager?

1 MR. TENENBAUM: To the extent you know, you
2 may give your understanding.

3 A. Those are pretty clearly explained in
4 the National Contingency Plan, which is
5 generally available for reading.

6 Generally, the on scene coordinator is
7 on site and directs all fund financed efforts
8 for cleaning up or addressing a threat at the
9 particular site.

10 BY MR. KARAGANIS:

11 Q. Threat to what?

12 A. To public health, or the environment.

13 Q. All right.

14 And the remedial project manager?

15 A. The remedial project manager and PRP of
16 the site would review, provide comments on
17 documents relating to the study of the site and
18 participate in all decision-making processes,
19 prepare or recommend remedial actions at the
20 site.

21 Q. Does the remedial project manager have
22 a role when there is fund financed activity at
23 the site?

24 A. Yes. He has the same role, except he

1 oversees the fund financed action rather than
2 the action being conducted by potentially
3 responsible parties.

4 Q. In fund financed sites, can there be
5 both a remedial project manager and an on scene
6 coordinator at the same site?

7 A. If there is removal action being taken,
8 then there could be both. Yes.

9 Q. And --

10 A. And it is an NPL site.

11 Q. With respect to that, would it be
12 correct that both the on scene coordinator and
13 the remedial project manager have a
14 responsibility to address threats to the public
15 health and the environment?

16 MR. TENENBAUM: Objection, vague. And also
17 the same continuing objections previously noted.

18 A. That's correct.

19 MR. KARAGANIS: Thank you.

20 There is a good breaking point.

21 Just while we are on the record --

22 MR. TENENBAUM: If we are going to get these
23 documents, we need extra time to get them.

24 MR. KARAGANIS: I want to stay on the

1 record.

2 Where are the documents that are
3 reflected in Exhibit C-I that are not in the
4 Boice Deposition Exhibit No. 3 index?

5 MR. TENENBAUM: Those were produced to you
6 previously.

7 MR. KARAGANIS: I didn't ask you that. That
8 isn't my question. I asked where they are with
9 respect to EPA?

10 A. Okay. Yes.

11 As he mentioned, they are already
12 available to the defendants. And they are also
13 in EPA's files.

14 BY MR. KARAGANIS:

15 Q. Are they maintained as a separate set
16 of files?

17 A. There is a separate set of files for
18 Midco.

19 Q. Is there an index to those separate set
20 of files?

21 A. No.

22 Q. How is the index that is Exhibit C-I
23 prepared?

24 A. By going through the documents.

1 Q. And are the files that you now have
2 with regard to Midco I that are not listed in
3 Boice Deposition Exhibit No. 3, do those contain
4 only the documents listed in Exhibit C-1?

5 A. There is probably some more documents,
6 I'm not sure. These were to tabulate EPA
7 activity. There may be other documents in
8 there.

9 Q. Were those documents post-'85 made
10 available to the defendants, delivered to the
11 defendants?

12 A. My understanding is that we provided
13 all our file documents to the defendants.

14 Q. That was '85. I am asking you whether
15 or not --

16 A. I you said post '85.

17 Q. Post '85.

18 A. Well, these are all pre-'85.

19 Q. I understand that. I am now asking you
20 about post '85.

21 A. Okay.

22 So what is the question?

23 Q. Did you make the documents that are
24 post '85 that are not listed in Boice Deposition

1 Exhibit No. 3 that relate to Midco I or Midco II
2 available to the defendants?

3 A. Oh.

4 By Boice Deposition 3, you mean --

5 Q. Boice Deposition Exhibit No. 3 is a set
6 of documents which purport to be indices to
7 several administrative records.

8 I am asking you about documents that
9 are not listed in Boice Deposition Exhibit
10 number 3. As to those documents which were
11 generated after you last made a submission of
12 documents to the defendants, have you made the
13 post '85 documents available to the defendants?

14 MR. TENENBAUM: That is documents that are
15 not in Exhibit 3.

16 A. Okay.

17 MR. KARAGANIS: We know that there are
18 documents that aren't in Exhibit No. 3, Mr.
19 Tenenbaum.

20 MR. TENENBAUM: That are post '85?

21 MR. KARAGANIS: Yes.

22 MR. TENENBAUM: That's the first I have
23 heard of it.

24 MR. KARAGANIS: Mr. Tenenbaum, you know that

1 there are documents post '85 that aren't in
2 Exhibit 3.

3 MR. TENENBAUM: I don't know which document
4 you are referring to.

5 BY MR. KARAGANIS:

6 Q. Let's just lay a foundation question.

7 Mr. Boice, is it not correct that there
8 are documents that postdate 1985 that relate to
9 Midco I and Midco II that are not listed in --

10 MR. TENENBAUM: You mean the draft material
11 and deliberative-process material?

12 MR. KARAGANIS: I don't care what kind of
13 documents they are.

14 Q. Are there documents that are in the
15 Midco I and Midco II materials that are not
16 listed in Exhibit 3, Boice Deposition Exhibit 3,
17 that postdate 1985?

18 A. Yes. Including some attorney-client
19 privileged documents and so forth.

20 MR. KARAGANIS: Mr. Tenenbaum, have you
21 identified which documents you have withheld
22 under claim of privilege of any kind with regard
23 to --

24 MR. TENENBAUM: I am not here to -- I am not

1 here to testify. If you want to make an
2 inquiry --

3 MR. KARAGANIS: Mr. Tenenbaum, let me
4 suggest that you go back on lunch break and
5 consider coming back with an index of documents
6 that have been withheld.

7 MR. TENENBAUM: Right.

8 I am going to come back with an index
9 over the lunch break. Right.

10 A. I think we should clarify, too, that
11 since the defendants conducted the remedial
12 investigation --

13 MR. TENENBAUM: We haven't gotten documents
14 from the defendants since '85 --

15 MR. KARAGANIS: This is not a question of
16 who did what. We are talking about your
17 responsibilities.

18 A. I think we should clarify, too, that
19 since the defendants conducted the RI/FS --

20 MR. TENENBAUM: There is no question
21 pending.

22 A. They have almost all the documents.

23 MR. KARAGANIS: Let's go back at it after
24 lunch.

1 MR. TENENBAUM: If you want to discuss your
2 post '85 attorney-client documents and attorney
3 work product documents, and if you want us to
4 discuss our post '85 attorney-client work
5 product and attorney client documents.

6 MR. KARAGANIS: I want you to discuss the
7 non --

8 MR. TENENBAUM: We will be glad to discuss
9 them.

10 MR. KARAGANIS: The non.

11 MR. TENENBAUM: If you want to discuss post
12 '85 non-documents, --non-attorney-client
13 documents, and if there any of those, we will be
14 glad to look into that.

15 MR. KARAGANIS: Fine. Please come back
16 after the lunch break with the documents that I
17 have requested.

18 MR. TENENBAUM: We are going to need -- you
19 have asked for a long list of documents.

20 MR. KARAGANIS: Take half an hour.

21 I haven't asked for a long list of
22 documents.

23 MR. TENENBAUM: You have asked for more than
24 ten documents, I think.

1 MR. KARAGANIS: Take 45 minutes, let's move
2 ahead

3 2:45. Can you do it in an hour and 15
4 minutes? Let's do it in an hour and 15
5 minutes.

6 MR. BERMAN: 2:45.

7
8 (Whereupon the deposition was
9 continued to 2:45 o'clock
10 p.m. of the same day.)
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIDWEST SOLVENT RECOVERY INC.,
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC., INDUSTRIAL TECTONICS,
INC., V & E CORPORATION, ERNEST DE
HART, EDWARD D. CONLEY, HELGA C.
CONLEY, LOVIE DE HART, CHARLES A.
LICHT, DAVID E. LICHT, DELORES LICHT,
EUGENE KLISIAR, JEANETTE KLISIAR,
LUTHER G. BLOOMBERG, ROBERT J. DAW-
SON, JR., JOHN MILETICH, MARY
MILETICH, PENN CENTRAL CORPORATION,
INSILCO CORPORATION, RUST-OLEUM, INC.,
ZENITH RADIO CORPORATION, STANDARD T
CHEMICAL COMPANY, INC., AMERICAN CAN
COMPANY, INC., PRE FINISH METALS, INC.,
PREMIER COATINGS, INC., MOTOROLA, INC.,
and DESOTO, INC.,

Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,

) Civil Action
) No. H-79-556
) Third-Party
) Complaint

1	AMERICAN PRINTER & LITHOGRAPHER CO.,)
	AMERICAN RIVET COMPANY, APFCO,)
2	APPROVED INDUSTRIAL REMOVAL, INC.,)
	ARMOUR PHARMACEUTICAL, ARTISAN HAND)
3	PRINTS, ASHLAND CHEMICAL CO.,)
	AVENUE TOWING COMPANY, BARR &)
4	MILES, INC., BELDEN ELECTRICAL)
	PRODUCTS DIV. OF COOPER INDUSTRIES,)
5	INC., BRETFORD MANUFACTURING, INC.,)
	BUTLER SPECIALTY COMPANY, INC.,)
6	BY PRODUCTS MANAGEMENT, CALUMET)
	CONTAINER, CARGILL, INC.,)
7	CHEMALLOY DIVISION OF FISHER- CALO)
	CHEMICAL CO., CHICAGO ETCHING CORP.,)
8	CHICAGO NAMEPLATE COMPANY,)
	CHICAGO ROTOPRINT CO.,)
9	C & C INDUSTRIAL MAINTENANCE CORP.,)
	CITY OF GARY, INDIANA, C.P. CLARE)
10	DIVISION OF GENERAL INSTRUMENTS)
	CORP., C.P. HALL CO.,)
11	C.P. INORGANICS, COMMANDER PACKAGING,)
	CONNOR FOREST INDUSTRIES, CONSERVA-)
12	TION CHEMICAL, CONSUMERS PAINT)
	FACTORY, INC., CONTINENTAL)
13	WHITE CAP DIVISION OF CONTINENTAL)
	CAN COMPANY, CONVERSIONS BY GERRING,)
14	COUNTY OF DU PAGE, ILLINOIS,)
	CRONAME, INC., CROWN CORK & SEAL)
15	CO., INC., CULLIGAN INTERNATIONAL)
	COMPANY, CULLIGAN WATER CON-)
16	DITIONING, INC., FRANK J. CURRAN,)
	CUSTOM METALS PROCESSING,)
17	DAP, INC. OF BERCHAM COSMETICS,)
	DAUBERT CHEMICAL COMPANY,)
18	DEUBLIN COMPANY, DOBSON CONSTRUCTION)
	INC., DUO FAST CORPORATION, DU-TONE)
19	CORP., HAROLD EGAN, ERCO HOUSEWARE)
	CO., EL-PAC, INC., EMBOSOGRAPH DIS-)
20	PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
	ETHICON, INC., FELT PRODUCTS MFG. CO.,)
21	FLINT INK CORP., FURNAS ELECTRIC)
	CO., GEARMASTER DIVISION, EMERSON)
22	ELECTRIC, THE GILBERT & BENNETT)
	MFG. CO., GLD LIQUID DISPOSAL,)
23	HENRY PRATT COMPANY, J.M. HUBER)
	CORPORATION, HYDRITE CHEMICAL CO.,)
24	INTAGLIO CYLINDER SERVICE, INC.,)

1 JOHNSON & JOHNSON, J & S TIN MILL)
 2 PRODUCTS, KNAACK MFG. CO., LANSING)
 3 SERVICE CORPORATION, LAUTTER)
 4 CHEMICAL, LIQUID DYNAMICS,)
 5 LIQUID WASTE, INCORPORATED,)
 6 STEVE MARTEL, MASONITE CORPO-)
 7 RATION, McWHARTER CHEMICAL CO.,)
 8 METAL RECLAIMING CORPORATION,)
 9 METROPOLITAN CIRCUITS,)
 10 MIDWEST RECYCLING COMPANY, MONTGOMERY)
 11 TANK LINES, MORTON THIOKOL INC.,)
 12 MR. FRANK, INC., NAMSCO, INC.,)
 13 NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
 14 NUCLEAR DATA, INC., PPG INDUSTRIES,)
 15 INC., PASLODE COMPANY, PIERCE & STEVENS)
 16 CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
 17 PREMIER PAINT CO., PYLE-NATIONAL CO.,)
 18 R-LITE, REFLECTOR HARDWARE CORP.,)
 19 REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
 20 RICHARDSON GRAPHICS, JOHN ROSCO,)
 21 ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
 22 MANUFACTURING, SCHOLLE CORPORATION,)
 23 SCRAP HAULERS, SHERWIN WILLIAMS)
 24 COMPANY, SHELD COATINGS, INC.,)
 SIZE CONTROL COMPANY, SKIL CORPORA-)
 TION, SPICAL COATINGS CO.,)
 SOUTHERN CALIFORNIA CHEMICAL,)
 SPECIALTY COATINGS, INC.,)
 SPOTNAILS, INC., STAR TRUCKING, STERN)
 ELECTRONICS, INC., JOE STRAUSNICK,)
 STUART CHEMICAL & PLANT, INC.,)
 SUMMER & MACE, SUN CHEMICAL,)
 SYNTech WASTE TREATMENT CENTER,)
 T.R.C., TERPACK, INC., ALFRED TENNY,)
 THIELE-ENGDAHL, INC., THOMPSON)
 CHEMICALS, TIFPT CHEMICALS,)
 TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
 UNIROVAL, INC., UNITED RESIN AD-)
 HESIVES, INC., U.S. ENVELOPE, U.S.)
 SCRAP AND DRUM, U.S. STERL CORP., UNI-)
 VERSAL RESEARCH LABORATORIES, INC.,)
 UNIVERSAL TOOL & STAMPING COMPANY,)
 VANDER MOULEN DISPOSAL, VELSICOL)
 CHEMICAL CORP., VICTOR GASKET)
 DIVISION OF DANA CORPORATION,)
 WARNER ELECTRIC BRAKE & CLUCH CO.,)
 WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)
3 Third-Party Defendants.)

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6
7 DEPOSITION OF RICHARD E. BOICE

8
9 August 2, 1990
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6 The continued deposition of RICHARD
7 EDWIN ROICE, called for examination by the
8 Defendants, pursuant to notice and pursuant
9 to the provisions of the Federal Rules of
10 Civil Procedure of the United States
11 District Courts, pertaining to the taking
12 of depositions for the purpose of
13 discovery, taken before Arnold N.
14 Goldstine, a Notary Public and Certified
15 Shorthand Reporter within and for the
16 County of Cook and State of Illinois, at
17 227 West Monroe Street, on August 2, 1990,
18 commencing at the hour of 2:45 o'clock p.m.
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APPEARANCES:

Mr. Alan S. Tenenbaum and
Mr. Leonard M. Gelman
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Land & Natural Resources Division
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-and-

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-and-

Peter W. Moore
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United States of America;

APPEARANCES (CONTINUED):

Mr. Robert M. Olian
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appeared on behalf of
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Mr. William G. Dickett
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appeared on behalf of
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appeared on behalf of
Desoto, Inc.;

Mr. Joseph V. Karaganis
Karaganis & White, Ltd.
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appeared on behalf of
American Can Company, Inc.;

1 **APPEARANCES (CONTINUED):**

2
3 **Mr. James T. J. Keating**
4 **Law Offices of James T. J. Keating, P.C.**
5 **Printers Row**
6 **542 South Dearborn Street**
7 **Chicago, Illinois 60605**

8 **appeared on behalf of**
9 **Premier Coatings, Inc.;**

10 **Mr. Edward J. Leahy**
11 **Leahy, Eisenberg & Fraenkel, Ltd.**
12 **309 West Washington Street**
13 **Chicago, Illinois 60606**

14 **appeared on behalf of**
15 **Scholle Corp.;**

16 **Mr. David S. Pinch**
17 **McDermott, Will & Emery**
18 **227 West Monroe Street**
19 **Chicago, Illinois 60606-5096**

20 **Mr. Richard S. VanRheenen**
21 **Cromer, Eaglesfield & Maher, P.A.**
22 **Station Place**
23 **200 South Meridian Street**
24 **Indianapolis, Indiana 46225**

appeared on behalf of
 J & S Tin Mill Products Company,
 Inc., et al.;

1 **APPEARANCERS (CONTINUED):**

2
3 **Mr. Ralph W.F. Lustgarten**
4 **Taylor, Miller, Sprowl, Hoffnagle &**
5 **Merletti**
6 **33 North LaSalle Street**
7 **Chicago, Illinois 60602-2602**

8 **appeared on behalf of Third-**
9 **Party Plaintiffs Desoto, et al.;**

10 **Ms. Carol Dorge and**
11 **Mr. Brent Clark**
12 **Seyfarth, Shaw, Fairweather & Geraldson**
13 **55 East Monroe Street**
14 **42nd Floor**
15 **Chicago, Illinois 60603**

16 **appeared on behalf of**
17 **Motorola, Inc.**

1 RICHARD E. BOICE,
2 having been previously duly sworn,
3 was examined and testified further as follows:

4 DIRECT EXAMINATION

5 (CONTINUED)

6 BY MR. KARAGANIS:

7 Q. Mr. Boice, the Midco I site, that has
8 been listed on the National Priorities List, has
9 it not?

10 A. That's correct.

11 Q. And that was in December of '82?

12 A. Possibly.

13 Q. Is there an item or document in the
14 index that you have put together of the various
15 administrative records, Boice Deposition Exhibit
16 number 3, that reflects the listing of the site
17 on the National Priorities List?

18 A. Do you mean that provides the scoring
19 information?

20 Q. First of all, it contains the actual
21 listing of the site on the NPL.

22 A. I don't know what you mean.

23 Q. Well, do you know how a site is
24 normally -- the announcement, the official

1 decision that a site is on the NPL, how is that
2 decision recorded or announced?

3 A. I guess there is a --

4 MR. TENENBAUM: Don't guess. Only what you
5 know.

6 A. I don't know.

7 BY MR. KARAGANIS:

8 Q. Are you familiar with the decision
9 being made by EPA placing the site on the
10 National Priorities List?

11 A. I know it has been placed on the
12 National Priorities List.

13 Q. Is there anything in the certified
14 index to the administrative record or records,
15 plural, of Boice Deposition Exhibit 3 that
16 reflects an official designation of the site on
17 the National Priorities List?

18 A. I don't think so.

19 Q. So there's no way from this record of
20 verifying that the site is on the National
21 Priorities List?

22 A. I would have to look through the index.

23 Q. Please look.

24 MR. TENENBAUM: I don't know.

1 I don't want you -- if you want to ask
2 the question you can. But, the first question
3 was an official designation. The next question
4 was, so there's no way to tell that it was put
5 on the NPL. Now, those are two different
6 questions.

7 MR. KARAGANIS: I am asking where there is
8 any official document in the certified indices
9 to the administrative records that verifies that
10 this site has been placed on the National
11 Priorities List justifying remedial action.

12 MR. TENENBAUM: Well, I think you have asked
13 two different questions, and now a third one.

14 The witness can answer the best he can,
15 subject to my objection that it is vague and
16 ambiguous.

17 A. There is a preliminary assessment by
18 Ecology & Environment, which was a portion of
19 the site scoring package dated March 10, 1983.

20 BY MR. KARAGANIS:

21 Q. March 10, 1983?

22 A. Yes.

23 Q. I see.

24 When you say preliminary assessment, is

1 that a term of art under the federal
2 regulations?

3 MR. TENENBAUM: Objection, calls for a legal
4 conclusion.

5 BY MR. KARAGANIS:

6 Q. If you know.

7 Is that a term used or is that term
8 used --

9 A. I think it is a special term used for
10 an evaluation conducted towards the site
11 scoring.

12 Q. And is the site scoring included in the
13 preliminary assessment?

14 A. No.

15 Q. Okay.

16 Isn't it true that in order for a site
17 to be placed on the National Priorities List, it
18 has to have a site scoring activity undertaken?

19 MR. TENENBAUM: Objection, calls for a legal
20 conclusion.

21 Only answer what you know, subject to
22 my objection, if you know anything.

23 BY MR. KARAGANIS:

24 Q. All right.

1 A. Do you mean before remedial action,
2 final remedial actions are taken under CERCLA,
3 other than through the removal program, it has
4 to be listed on the National Priorities List?

5 Q. Right.

6 A. That's correct.

7 Q. Now, is there anything in the record
8 indices supporting the inclusion of this site,
9 the Midco I site, on the National Priorities
10 List?

11 A. I am still looking.

12 MR. TENENBAUM: Take your time. Look at the
13 index and the documents.

14 We can allow the witness to look at all
15 the indices and whatever documents inside,
16 referenced in the indices if you want. But, I
17 don't know what is the point in the exercise of
18 making him look for which document or documents
19 refer to the NPL site.

20 MR. KARAGANIS: Mr. Tenenbaum --

21 MR. TENENBAUM: Can I finish for a second?

22 MR. KARAGANIS: Sure.

23 MR. TENENBAUM: I am sure that the documents
24 putting these sites on the NPL are predating

1 '85. They would have been documents that would
2 have been produced to you.

3 MR. KARAGANIS: I just want to find out if
4 the documentation to support putting this site
5 on the National Priorities List is in the
6 so-called record of decision.

7 If it is not, it is illegal, because
8 there is no --

9 MR. TENENBAUM: I am not sure that you are
10 right about that.

11 But, if you would like to make --

12 As I indicated earlier, if you would
13 like to make a request, if it is not already in
14 there, or some substitute is not already in
15 there, the official request or designation of
16 either of these sites as an NPL site.

17 If you want them in the administrative
18 record and they are not already in there, if you
19 would like to make such a request, we will look
20 at it.

21 MR. KARAGANIS: The government has got a
22 responsibility for establishing the basis for
23 the action as being consistent with --

24 MR. TENENBAUM: We produced these documents

1 to you. What more do you want?

2 MR. KARAGANIS: I am asking for the basis
3 for inclusion on the NPL. I don't see it. I
4 don't find it in the record.

5 MR. TENENBAUM: Well, if you want him to
6 take the time and look at every document in the
7 record to see if it is in there, we can have him
8 do that.

9 If it is not in the record and you want
10 to request that it be in the record, we can do
11 that, too.

12 MR. KARAGANIS: That's your burden of
13 establishing what you think should be in the
14 record.

15 The fact is that --

16 MR. TENENBAUM: I think you have a
17 responsibility here in trying to bring these
18 matters before the court.

19 MR. KARAGANIS: We are going to bring them
20 before the court.

21 MR. TENENBAUM: In as proper fashion as
22 possible. I know that you will bring them
23 before the court.

24 MR. KARAGANIS: I am trying to find out what

1 else is --

2 MR. TENENBAUM: You would like to drag this
3 case out for years and have the thing remanded
4 back to the Agency to put things in the record,
5 that if you just tell us now we will take care
6 of your problem, if you are right.

7 BY MR. KARAGANIS:

8 Q. Mr. Boice, isn't it correct --

9 MR. TENENBAUM: No, I didn't finish one of
10 my points.

11 That was with respect to there being a
12 basis for taking actions, of this being an NPL
13 site. That is a separate question, if there is
14 a document he can pick out of the record. These
15 documents were produced to you previously and I
16 am sure that you have as good access to them as
17 we do.

18 MR. KARAGANIS: Are you done?

19 MR. TENENBAUM: For now.

20 BY MR. KARAGANIS:

21 Q. Mr. Boice, isn't it a fact that there
22 is no document in the administrative record
23 indices reflected in Boice Deposition Exhibit
24 No. 3 that contains either the technical or

1 factual justification for listing on the NPL
2 list, or the actual listing of the Midco I site
3 on the NPL list?

4 MR. TENENBAUM: If the witness is finished
5 looking, he can answer. If not, he will have to
6 keep on looking if you are going to insist on an
7 answer to that.

8 I would object to it, any way.

9 MR. KARAGANIS: You have objected.

10 MR. TENENBAUM: Process of discovering into
11 the compilation of the record.

12 You can read the record as well as we
13 can read the record.

14 A. I looked through the index and I didn't
15 see the site scoring documentation in the
16 administrative record.

17 Although, there is a record of that
18 information and it is publicly available and
19 there is a comment period where the public,
20 including private parties, responsible parties,
21 can review the site scoring information and
22 provide comments before it is added to the
23 National Priorities List.
24

1 BY MR. KARAGANIS:

2 Q. So this is what is known as a scoring
3 package or HRS package; is that right?

4 A. Yes.

5 Q. That stands for the hazard ranking
6 system?

7 A. Yes.

8 Q. That's one of the requirements that
9 needs to be done for a site before permanent
10 remedial action can be undertaken under the
11 National Contingency Plan, isn't that right?

12 MR. TENENBAUM: Objection, calls for a legal
13 conclusion.

14 MR. KEATING: I don't know.

15 It is an administrative conclusion or a
16 legal conclusion?

17 MR. KARAGANIS: His objection is noted.

18 MR. TENENBAUM: If you know the answer.

19 Now, I don't want you speculating about
20 what you don't know. If you know the answer,
21 you can answer.

22 MR. KARAGANIS: You better know the answer.

23 MR. TENENBAUM: If you think you know the
24 answer, you may answer. If you don't, say you

1 don't know.

2 A. Yes.

3 Any site has to go through the scoring
4 system and test score high enough to place it on
5 the National Priorities List.

6 BY MR. KARAGANIS:

7 Q. And that score, at least at the time of
8 this site, was 28.5, was it not?

9 A. I don't remember.

10 Q. Okay.

11 Have you ever scored a site?

12 A. I reviewed a scoring.

13 Q. Once the scoring package is done, then
14 there actually has to be an official
15 determination that the site should be placed on
16 the NPL, isn't that right?

17 MR. TENENBAUM: Objection, calls for a legal
18 conclusion.

19 BY MR. KARAGANIS:

20 Q. Go ahead.

21 A. I know the Agency, once they score the
22 sites, I should say there is an exception to
23 that scoring. There are provisions in the
24 National Contingency Plan for a state to propose

1 certain sites to be placed on the National
2 Priorities List.

3 But, normally it is scored. And if it
4 scores high enough, the government makes some
5 type of announcement that it is proposed for the
6 National Priorities List. Then there is comment
7 period and then it is officially added to the
8 National Priorities List.

9 Q. Now, Mr. Boice, the State of Indiana
10 didn't propose the Midco I site for inclusion on
11 the National Priorities List, did it?

12 A. I don't know.

13 Q. Mr. Boice, after the removal action at
14 the Midco I site was completed in July of 1982,
15 was there any attempt then to determine whether
16 or not post-removal conditions endangered the
17 public health?

18 A. Absolutely. That was the --

19 MR. TENENBAUM: Post-removal.

20 To the extent you are seeking to take
21 discovery on record issues, I will object. I
22 will allow you to answer, though, subject to my
23 objection.
24

1 BY MR. KARAGANIS:

2 Q. Go ahead.

3 A. Yes.

4 And that was the remedial investigation
5 feasibility study which was conducted by
6 Dames -- ERM, Geosciences and Dames & Moore for
7 the Midco Steering Committee. That was the
8 follow up on the removal action.

9 Q. When was the remedial investigation
10 done?

11 A. When was it done. It was initiated in
12 June -- well, EPA initiated it in March 1985.
13 We discontinued it when the PRP's offered to
14 conduct the study.

15 The PRP's initiated it around at least
16 by May 1985.

17 Q. Let's go back if we can to the summer
18 of -- I am sorry.

19 After the removal clean up of the Midco
20 I site, did Dr. Stein or any other public health
21 officials evaluate the site after removal from
22 the standpoint of chemical exposure and
23 potential health effects?

24 A. Yes.

1 Q. And is that in the record?

2 A. Yes.

3 Q. Could you find that for me, please?

4 A. This is a document from ATSDR or from
5 CDC?

6 Q. I assume it is CDC.

7 To assist you, according to my notes,
8 there is a memorandum by a Stein involving
9 conclusions regarding chemical exposure and
10 potential health effects, 11-22-82, presumably
11 contained in the Midco ROD index.

12 A. Okay. I saw that. But, I don't know
13 whether that is relevant to after the removal
14 action or not.

15 Q. It postdated the removal action.

16 A. I will check and see what you are
17 referring to, or what you requested.

18 I found the site inspection report
19 which is also part of the site scoring package
20 as well as the preliminary assessment dated
21 August 30, 1982.

22 Q. That related to my earlier series of
23 questions; is that right?

24 A. That's correct.

1 Q. But that does not include the total
2 scoring package, does it?

3 A. It doesn't include the actual scoring
4 calculations.

5 Q. Are you looking for Mr. Stein's report?

6 A. Yes, here it is.

7 Q. Does that assess public health
8 conditions at the site?

9 MR. TENENBAUM: Excuse me. This witness
10 didn't write this. The letter speaks for
11 itself.

12 I don't think he is here to interpret
13 the letter for you.

14 A. This really doesn't evaluate site
15 conditions after cleanup.

16 BY MR. KARAGANIS:

17 Q. Okay.

18 MR. TENENBAUM: I have to object to this
19 questioning of the witness on letters that he
20 didn't write.

21 You can read the letter as well as he
22 can.

23 MR. KARAGANIS: Not if the letters don't
24 contain information and data that would allow

1 EPA or anybody else to evaluate hazard
2 conditions at the site.

3 MR. TENENBAUM: I didn't follow that point.

4 BY MR. KARAGANIS:

5 Q. Mr. Boice, after the clean up in July
6 of 1982 at Midco I, did an imminent and
7 substantial endangerment to the public health
8 exist at the Midco I site?

9 MR. TENENBAUM: Excuse me.

10 How is that relevant to a non-record
11 issue?

12 MR. KARAGANIS: It is relevant to whether or
13 not we have sufficient cause to resist what I
14 believe is an inaccurate -- I am using the word
15 charitably -- an inaccurate claim of a public
16 health endangerment existing as of December of
17 1989.

18 MR. TENENBAUM: How would something in '81
19 reflect on something in '89?

20 MR. KARAGANIS: If you need me to explain
21 that to you, I would be happy to.

22 MR. TENENBAUM: Why don't you.

23 Otherwise, I am going to have to
24 instruct him not to answer.

1 MR. KARAGANIS: I will ask him whether or
2 not there are any conditions that were different
3 in 1989 from 1981 or 1982, excuse me, after the
4 removal.

5 MR. TENENBAUM: How is that relevant to
6 whether there is an imminent and substantial
7 endangerment in '89?

8 MR. KARAGANIS: Because it would indicate --
9 Did EPA think there was one in '81 or
10 '82?

11 MR. TENENBAUM: I am not going to answer the
12 questions.

13 But, in any event, discovery into
14 imminent substantial endangerment we contend is
15 a record issue. Even apart from that, it is not
16 relevant. If there is one in '89, there is one
17 in '89.

18 MR. KARAGANIS: But, if there wasn't one in
19 1982 after removal, there wasn't one in 1989.

20 If there was one in 1982 after removal,
21 then one wonders why EPA was sitting on its
22 posterior.

23 MR. TENENBAUM: EPA or the PRP's.

24 MR. KARAGANIS: No, EPA.

1 I don't suggest that EPA was sitting on
2 its posterior. I think there was a rather
3 creative discovery of an imminent and
4 substantial endangerment in 1989.

5 MR. TENENBAUM: You are seeking discovery on
6 the imminent and substantial endangerment issue,
7 and our position is this is a record issue.

8 And I will have to instruct the witness
9 not to answer.

10 BY MR. KARAGANIS:

11 Q. Mr. Boice, was there an imminent and
12 substantial endangerment to the public health at
13 the Midco I site after the removal action was
14 completed in July of 1982?

15 MR. TENENBAUM: Same objection.

16 I will have to instruct the witness not
17 to answer. This witness wasn't even there in
18 '82, furthermore.

19 BY MR. KARAGANIS:

20 Q. Mr. Boice, could you answer that
21 question, had you not been instructed not to
22 answer it by your counsel?

23 A. Yes.

24 Q. Mr. Boice, was there anything different

1 about conditions impacting the public health in
2 December of 1989 as opposed to December of 1982
3 at the Midco I site?

4 MR. TENENBAUM: Same objection and
5 instruction.

6 You haven't told me how this is
7 relevant to any issue other than the finding of
8 imminent and substantial endangerment in '89.

9 MR. KARAGANIS: It relates to whether or not
10 we have sufficient cause and whether we are
11 acting in bad faith.

12 MR. TENENBAUM: How?

13 MR. KARAGANIS: Because if the imminent and
14 substantial endangerment claim by the government
15 is a phony, then we are not in bad faith,
16 somebody else is.

17 MR. TENENBAUM: You are saying, under that
18 theory anything that is subject to record-review
19 is subject to discovery, because if the Agency
20 is wrong, then you had sufficient cause not to
21 obey the order.

22 That would mean there would be no
23 record-review -- there would be discovery into
24 any record-review issue.

1 MR. KARAGANIS: Are you instructing the
2 witness not to answer?

3 MR. TENENBAUM: Yes, I am.

4 BY MR. KARAGANIS:

5 Q. All right.

6 Mr. Boice, if your counsel had not
7 instructed you not to answer, would you be able
8 to answer the question?

9 A. Yes.

10 Q. Okay.

11 MR. TENENBAUM: Again, also I would object
12 to all these questions to the extent they seek,
13 in addition to the grounds I have indicated,
14 record-review issues.

15 These questions also seem to, at least
16 in part if not in full, seek either legal
17 conclusions or expert testimony and I would
18 object to their being asked at this deposition.
19 It is not proper.

20 BY MR. KARAGANIS:

21 Q. Mr. Boice, from the standpoint of
22 evaluating whether the public health was
23 endangered at the site, was there any work done
24 in 1983?

1 MR. TENENBAUM: At Midco I?

2 MR. KARAGANIS: Midco I.

3 A. The summary of extent of contamination
4 study by ERT was finished. There was a
5 preliminary assessment conducted by Ecology &
6 Environment, there was a hydrogeologic study
7 completed by Ecology & Environment for the
8 government.

9 Q. Okay.

10 A. There was an endangerment assessment
11 completed by USEPA.

12 Q. An endangerment assessment?

13 A. Yes.

14 Q. What is that date?

15 A. December 22, 1983.

16 Q. December 22, 1983.

17 A. And I believe you indicated that the
18 site scoring was being conducted during that
19 period of time.

20 Q. No.

21 According to one of your statements,
22 the statement is made that the site was put on
23 the NPL in December '82.

24 A. No, that was your statement -- I said

1 possibly.

2 Q. Do you have anything in the record that
3 proves when it was put on the National
4 Priorities List?

5 A. I don't know.

6 MR. TENENBAUM: He wants to know without
7 looking, I think.

8 A. Not off the top of my head.

9 BY MR. KARAGANIS:

10 Q. Your best guess.

11 A. We have a preliminary assessment dated
12 March 10, 1983. Then I can't see how it could
13 have been already on the list. But, I have to
14 check it out.

15 MR. TENENBAUM: He wasn't even there before
16 '85. How would he know?

17 BY MR. KARAGANIS:

18 Q. Is it not correct that you cannot find
19 anything in Boice Deposition Exhibit No. 3 that
20 gives you a factual basis as to when the site
21 was placed on the National Priorities List?

22 MR. TENENBAUM: In 3 or the documents that
23 are listed on 3?

24 MR. KARAGANIS: In the documents that are

1 listed on 3.

2 MR. TENENBAUM: If you want to take up your
3 time of the deposition having him look through
4 the record looking for this, I think that would
5 be your prerogative.

6 MR. KARAGANIS: Let him start with the
7 index.

8 MR. TENENBAUM: He would have to look
9 through every page of the index.

10 MR. KARAGANIS: Mr. Tenenbaum, let the
11 witness try to answer the questions.

12 MR. TENENBAUM: I am trying to let him
13 answer the questions. I am just trying to move
14 this along.

15 MR. KARAGANIS: Other people might
16 characterize your response differently.

17 MR. TENENBAUM: We are in day eight of the
18 deposition and you have a lot of questions ahead
19 of you, I am sure.

20 BY MR. KARAGANIS:

21 Q. Mr. Boice, did you find any evidence in
22 your examination of the Boice record indices in
23 this case, Boice Deposition Exhibit No. 3,
24 reflecting any evidence that the site has been

1 placed on the National Priorities List?

2 MR. TENENBAUM: Any evidence?

3 MR. KARAGANIS: Yes.

4 A. I think I have to look through a lot of
5 documents to see if there is any reference to
6 the site scoring.

7 Yes. The feasibility study, the
8 remedial investigation would indicate that the
9 site was scored and placed on the National
10 Priorities List.

11 Q. So it would be just the feasibility
12 study, which was done by EPA, right?

13 A. The remedial investigation, possibly
14 the feasibility study mentioned it. Also there
15 is probably some other reports. There's a
16 remedial action master plan by CH2-M-Hill in
17 1984. There is a good chance it was mentioned
18 in that.

19 Q. Let's go back to your endangerment
20 assessment.

21 Directing your attention to your
22 answers to interrogatories in appendix C-I,
23 there is a reference on page 33 to an activity
24 on August 12, 1983, Dr. David Homer prepared a

1 Midco I endangerment assessment.

2 Do you see that?

3 A. Yes.

4 Q. Where do you see it?

5 A. I don't see it, but it is in the
6 administrative record also.

7 Q. What date is the one in the
8 administrative record?

9 A. December 22, 1983.

10 Q. And the December 22, 1983 has the
11 August 1983 endangerment assessment? Page 33 of
12 the document.

13 A. It states in the exhibits, Exhibit C-I
14 of USEPA's first response to objections to the
15 first set of interrogatories by the generator
16 defendants, page 33, that on August 12, 1983
17 USEPA, David Homer, I guess, prepared an
18 endangerment assessment.

19 The document generated was a December
20 22, '83 memo from Valdus Adamkus. So the dates
21 apparently agree.

22 Q. I see.

23 There are not two documents referenced
24 there, one by Valdus Adamkus and one by David

1 Homer?

2 A. The documents generated are listed in
3 the fourth column.

4 Q. Those are two documents listed there,
5 two authors, one document by David Homer and
6 another document by Valdus Adamkus?

7 A. I would have to take a look and see.

8 Q. Please look.

9 A. Okay. No problem.

10 Okay. I see in the administrative
11 record for Midco I a memo dated December 22,
12 1983 signed by Valdus V. Adamkus. It says:

13 "Attached, please
14 find the endangerment
15 assessment for Midco I and
16 II in Gary, Indiana. Based
17 on the attached endangerment
18 assessment, I have
19 determined that a release or
20 threat of release of
21 hazardous substances into
22 the environment may present
23 an imminent and substantial
24 endangerment to the public

1 health, welfare or the
2 environment."

3 Attached to that is Midco I
4 endangerment assessment, Dr. David Homer, signed
5 by Valdus Adamkus, December 22, 1983.

6 Q. Okay.

7 The document which is attached, which
8 is the Homer --

9 Well, let's go back.

10 Who is the author of the document that
11 has the handwritten legend, "12-22-83, Midco I
12 endangerment assessment, Dr. David Homer," which
13 on page 6 of that document is signed by Valdus
14 Adamkus?

15 MR. TENENBAUM: If you know.

16 A. What is the question.

17 BY MR. KARAGANIS:

18 Q. Who is the author of the document?

19 A. The author would be Dr. David Homer.

20 Q. All right.

21 Who is Dr. David Homer?

22 A. Who is --

23 At that time he worked for USEPA in the
24 RCRA program. He has a PhD in, I believe it is,

1 environmental science. And he did risk
2 assessment work for the Agency during that
3 period of time.

4 Q. I see.

5 And would it be a fair statement that
6 he and Mr. Adamkus concluded as of December
7 1983, that a release or threat of release of
8 hazardous substances into the environment may
9 present an imminent and substantial endangerment
10 to the public health or welfare or the
11 environment at the Midco I site?

12 MR. TENENBAUM: Object.

13 This witness is not the person to
14 answer that. He his name isn't on the document.
15 No reason to think that he can read the document
16 any better than you can read it.

17 BY MR. KARAGANIS:

18 Q. Go ahead.

19 A. Well, I think you read what the
20 document said.

21 Q. Would it be a fair statement by an
22 unsophisticated lay person that EPA in December
23 of 1983 had concluded that there was or may be
24 an imminent and substantial endangerment at both

1 the Midco I and Midco II sites?

2 MR. TENENBAUM: Object, no foundation.

3 Calls for -- no. Same objections as earlier.

4 BY MR. KARAGANIS:

5 Q. Go ahead.

6 MR. TENENBAUM: Only testify to what you
7 know firsthand. Don't guess.

8 A. Well, I don't know what a lay person
9 would conclude. But, Valdas Adamkus represents
10 the Region V USEPA.

11 BY MR. KARAGANIS:

12 Q. Yes.

13 A. And that's what he wrote on that
14 document.

15 Q. Can you tell me based on the -- let's
16 get one thing clear.

17 In your Exhibit C-I to your answers to
18 interrogatories, you listed an endangerment
19 assessment having been prepared by Homer in
20 August of 1983.

21 Is that a different endangerment
22 assessment than the one that is attached to the
23 December 22, '83 Adamkus memo?

24 A. I don't know.

1 Q. Were there various drafts of Homer's
2 endangerment assessment prepared and reviewed?

3 MR. TENENBAUM: Whatever you know. If you
4 weren't there then and don't know, then say you
5 don't know.

6 A. I know there were drafts prepared.
7 Yes.

8 BY MR. KARAGANIS:

9 Q. All right.
10 Are those drafts still in the files of
11 EPA?

12 A. They might be. I am not sure.

13 Q. Are the drafts of the Homer
14 endangerment assessment contained in the
15 documents listed in your certified indices to
16 the administrative record?

17 A. No.

18 As you can see, the record contains the
19 final document.

20 Q. So the drafts are not contained in the
21 administrative record; is that correct?

22 A. Uh-hum.

23 Q. Was that uh-hum?

24 A. Yes.

1 MR. TENENBAUM: Does American Can contend
2 that the drafts should be in the administrative
3 record?

4 MR. KARAGANIS: To the extent that the
5 drafts have relevant information, yes.

6 MR. TENENBAUM: Does American Can contend
7 that these drafts have such relevant
8 information?

9 MR. KARAGANIS: We believe that it may,
10 because we believe that the finding of an
11 endangerment here is an inaccurate finding; or,
12 if there were an endangerment, it should have
13 been acted on a lot earlier.

14 MR. TENENBAUM: Well, if American Can would
15 like to make any suggestions as to some addition
16 to the record, we will evaluate it.

17 I would point out that counsel for the
18 most of the other defendants take the position
19 that there's too much in the record in many
20 instances.

21 You would be hardly keeping the other
22 defendants happy if we put in all the zillions
23 of drafts of everything in the record.

24 MR. KARAGANIS: It is not a question of

1 keeping anybody happy. It is a question of
2 documents that are relevant to the issues that
3 are before the court.

4 MR. TENENBAUM: Oh, well, if American Can
5 believes that there is a document that belongs
6 in the record, as I have indicated, they should
7 please inform us and we will see whether we
8 agree.

9 BY MR. KARAGANIS:

10 Q. Mr. Boice, following the December 22,
11 1983 determination that a release or threat of
12 release of hazardous substances into the
13 environment may present an imminent and
14 substantial endangerment to the public health or
15 welfare or the environment; what action, if any,
16 did EPA take to abate the endangerment?

17 MR. TENENBAUM: Can we have that read back,
18 please.

19 (The record was read.)

20 You may answer to the extent you can,
21 that is seeking costs for any such actions
22 undertaken.

23 A. Okay.

24 MR. TENENBAUM: Again, against any

1 defendant, even if it is not necessarily against
2 all defendants.

3 A. Okay.

4 Well, we prepared as initiation to the
5 final investigation of the site, which would be
6 the remedial investigation feasibility study,
7 CH-2-M-Hill prepared a remedial action master
8 plan.

9 The date that was completed --

10 MR. TENENBAUM: I am sorry, unfortunately I
11 have confused things, I apologize and regret to
12 say.

13 You may answer with respect to any
14 costs that either are being sought or already
15 have been recovered.

16 Because I don't want to -- I am not in
17 a position to tell which ones have already been
18 recovered, so I will amend my previous
19 statement.

20 Subject to my objection, you may answer
21 with respect to the costs that EPA seeks to
22 recover or that EPA already has recovered.

23 A. Okay.

24 As I was saying, CH-2-M-Hill completed

1 the remedial action master plan which was
2 supposed to be an overall plan for addressing
3 contamination at the sites, or for evaluating
4 any contamination at the site. And then
5 developing alternatives for controlling the
6 contamination at the site or addressing the
7 contamination at the site. The date of that was
8 November 1984.

9 In February --

10 BY MR. KARAGANIS:

11 Q. Excuse me. Excuse me.

12 The remedial action master plan, dated
13 November '84, is that contained in the indices
14 to the administrative records that you reflect
15 in Boice Deposition Exhibit No. 3?

16 A. Yes.

17 Q. Okay.

18 Is the remedial action master plan
19 Midco draft report by CH-2-M-Hill referenced by
20 Mr. Valdas Adamkus and Mr. David Homer in
21 December of 1983 contained in the record?

22 A. I didn't understand your question.

23 Q. Directing your attention to the Adamkus
24 memorandum of December 22, 1983, with the Homer

1 endangerment assessment attached thereto and
2 signed by Adamkus, the first reference on page 6
3 is CH-2-M-Hill 1983 remedial action master plan
4 Midco draft report.

5 Is that draft report in the
6 administrative record?

7 A. As with other documents, we don't
8 include draft reports in the record. We put in
9 the final reports.

10 Q. The final report wasn't even created at
11 the time Adamkus did his endangerment letter,
12 was it?

13 A. Apparently not.

14 Q. So Adamkus based on it on a document
15 called the draft report, did he not?

16 A. Apparently, yes.

17 Q. Is the CH-2-M-Hill document that
18 Adamkus based his December 22, 1983
19 determination on in the administrative record
20 that you reference in Boice Deposition Exhibit
21 3?

22 A. The final report is in the --

23 Q. I didn't ask you that, Mr. Boice.

24 I asked you whether the CH-2-M-Hill

1 report that Mr. Adamkus bases his December 22,
2 1983 determination is in Boice Deposition
3 Exhibit No. 3?

4 A. The final report would have reflected
5 anything that -- important that would have been
6 in the draft report. As far as whether the
7 draft report was physically in the
8 administrative record, no, it is not.

9 Q. So it is correct, is it not, Mr. Boice,
10 that the document, the CH-2-M-Hill document
11 referred to by Mr. Adamkus and by Dr. Homer on
12 December 22, 1983, that CH-2-M-Hill report is
13 not in the administrative record indexed in
14 Boice Deposition Exhibit No. 3?

15 MR. TENENBAUM: The draft did you say?

16 A. The draft?

17 BY MR. KARAGANIS:

18 Q. The document referred to by Mr. Adamkus
19 and Mr. Homer.

20 MR. TENENBAUM: Objection, ambiguous.

21 A. The draft document is not in the
22 record.

23 The final document, which would
24 incorporate all important things in the draft

1 document, is in the administrative record.

2 BY MR. KARAGANIS:

3 Q. Mr. Boice, the final document was not
4 in existence in December 1983, was it?

5 A. I already answered that question.

6 Q. And the answer is it wasn't in
7 existence, isn't that right?

8 A. Of course not.

9 Q. Now, is it not correct -- all it takes
10 is a yes or no answer on this -- is it not
11 correct that the document relied upon by Mr.
12 Adamkus in December 1983, which was a
13 CH-2-M-Hill report dated in '83, is not in the
14 administrative record indexed in Boice
15 Deposition Exhibit 3?

16 A. I already answered that question.

17 Q. Would you please answer it?

18 A. As I stated before, the final document
19 is in the administrative record, which would
20 have incorporated all significant information
21 that would have been in the draft document.

22 MR. KARAGANIS: Counsel, would you instruct
23 the witness that I am not required to take his
24 characterization of what a document does or

1 doesn't say, and I am entitled to a yes or no
2 answer to a direct question.

3 MR. TENENBAUM: You are entitled to a yes or
4 no answer if the witness can understand it and
5 give a yes or no answer.

6 BY MR. KARAGANIS:

7 Q. Are you having difficulty fathoming my
8 question?

9 A. Are you having difficulty fathoming my
10 answer?

11 Q. Yes.

12 A. I don't see why.

13 Q. Yes, I am.

14 MR. TENENBAUM: I think that --

15 A. We just want --

16 MR. TENENBAUM: You keep on asking whether a
17 letter --

18 MR. KARAGANIS: Not a letter, a report,

19 MR. TENENBAUM: A report, rather, was in the
20 record. And he can't answer that, other than
21 what he has, because there is both a draft of
22 the letter and a final of the letter.

23 BY MR. KARAGANIS:

24 Q. The draft is not in the record, is it?

1 A. We already said the draft document is
2 not in the administrative record.

3 Q. Thank you.

4 And the draft document is what Mr.
5 Adamkus was referring to, is it not?

6 A. Yes.

7 Q. Mr. Boice, the master plan of November
8 1984, was there correspondence that went back
9 and forth with CH-2-M-Hill?

10 Adamkus' December '83 memo refers to an
11 '83 draft. Now, we don't see a master plan
12 report until November '84. That is a period of
13 eleven months to a year.

14 Was there correspondence that went back
15 and forth between EPA and CH-2-M-Hill on their
16 master plan report?

17 A. I don't know.

18 Q. Is there any in the file?

19 A. I don't know.

20 Q. Well, who on the Midco project was
21 working with CH-2-M-Hill?

22 A. This was probably Karen Waldvogel.

23 Q. What was her role?

24 A. She was the remedial project manager

1 for the Midco I site at that time.

2 Q. She was your immediate predecessor?

3 A. Yes.

4 Q. Are you are now in possession of her
5 files?

6 A. Yes.

7 Q. In the course of preparing the
8 certified indices to the various administrative
9 records, did you have occasion to go back
10 through her files to see whether or not there
11 was any material relative to the issue of
12 endangerment or remedy?

13 MR. TENENBAUM: Wait a second. You want to
14 take discovery into how he compiled the
15 administrative record index?

16 MR. KARAGANIS: Not how he compiled.
17 Whether or not he undertook a review of her
18 files.

19 MR. TENENBAUM: Sounds like this is getting
20 into compilation of the record. Isn't it?

21 MR. KEATING: He is going to charge for it,
22 one thing. He is going to make a charge for
23 hourly time put in. Then he is going to ask us
24 to pay back the money for the hours, and it is a

1 cost issue.

2 MR. TENENBAUM: The cost of him compiling
3 the administrative record, I don't think that
4 opens it up.

5 MR. KARAGANIS: Not only a cost issue, also
6 a completeness issue. There is also -- it is
7 not a 22-minute gap. It is about an
8 eleven-month gap.

9 MR. KEATING: Counsel, the point is, if he
10 is going to charge for that, the question was
11 did you do something.

12 Now, the question could be did you do
13 something that you are asking for reimbursement
14 for? And is it did you review Helen Keller's
15 notes, whatever her name was.

16 MR. TENENBAUM: You can review any discovery
17 questions and cost questions that way.

18 MR. KEATING: You are asking for money for
19 it.

20 MR. KARAGANIS: It is more than a cost
21 question.

22 The remedial action master plan, Mr.
23 Tenenbaum, appears to be an illegal and ultra
24 vires action outside the National Contingency

1 Plan.

2 I have never heard of one before --

3 MR. TENENBAUM: I am sorry. What was that?

4 MR. KARAGANIS: Ultra vires.

5 MR. TENENBAUM: Yes. I know what that
6 means.

7 MR. KARAGANIS: A figured you would.

8 MR. TENENBAUM: What was ultra vires did you
9 say?

10 MR. KARAGANIS: A remedial action master
11 plan.

12 MR. TENENBAUM: A remedial action master
13 plan.

14 MR. KARAGANIS: One of the issues in this
15 case, whether it be in the record or outside the
16 record, is going to be consistency with the
17 regulatory requirements of the National
18 Contingency Plan. And our alleged refusal to
19 comply with the 106 order can go to the question
20 of compliance with those regulations. This
21 remedial action master plan looks like a rogue
22 to me.

23 MR. TENENBAUM: I am not sure I am
24 following.

1 You are saying that this document, how
2 is that relevant to the case?

3 MR. KARAGANIS: It is relevant from a number
4 of perspectives.

5 It is relevant as to whether or not
6 they have followed the requirement of the
7 National Contingency Plan, whether they may have
8 predetermined a remedy, without going through
9 the RI/PS process.

10 MR. TENENBAUM: Well --

11 A. As we stated before, this plan is in
12 the administrative record.

13 MR. TENENBAUM: It is in the record.

14 MR. KARAGANIS: The final document, without
15 benefit of the correspondence reflecting
16 correspondence between the Agency and the
17 contractor, is in the record.

18 Where is the correspondence between the
19 agency and the contractor?

20 MR. TENENBAUM: Whatever correspondence --

21 MR. KARAGANIS: It is not reflected in the
22 record in this case.

23 MR. TENENBAUM: Wouldn't that have been --
24 if that would not be somehow unproduceable or

1 privileged, it would have been produced to you
2 in '85.

3 MR. KARAGANIS: Not to my knowledge. Was
4 it?

5 MR. TENENBAUM: Have you checked.

6 MR. KARAGANIS: No, I don't know.

7 A. I am sure we produced those.

8 Q. So you have no problem with
9 identifying, then, all of the correspondence
10 that relates to the original drafts and then the
11 correspondence between the Agency and the
12 contractor; is that right?

13 MR. TENENBAUM: We have to look at it. I
14 don't know.

15 Whatever we produced previously we
16 would have no problem producing again.

17 MR. KARAGANIS: I am asking for all of that
18 correspondence.

19 Q. You would agree, Mr. Boice, that the
20 correspondence between Waldvogel or other EPA
21 employees and CH-2-M-Hill relating to the drafts
22 and the preparation of the master plan is not in
23 the index to the administrative record contained
24 in Boice No. 3; is that right?

1 A. Well, in Exhibit C-I to our responses
2 to the generator defendant's first set of
3 interrogatories, identified under March '83
4 through November '84, task preparatory, remedial
5 action master plan, the only document generated
6 based on my review of all the files including
7 Karen Waldvogel's files was the remedial action
8 master plan, Midco I, 1984.

9 Q. Mr. Boice, we know from your previous
10 testimony there was one in 1983, wasn't there?

11 A. I meant there was no -- I didn't find
12 any correspondence related to that.

13 Q. You are saying that there was no
14 correspondence between EPA and the contractor
15 over an eleven-month period with regard to a
16 contract involving a remedial master plan for
17 this site?

18 A. I think what it indicates is that there
19 is no correspondence. No documentation was
20 prepared on it.

21 Q. I don't understand what you mean by
22 documentation.

23 Was there any correspondence, either
24 memoranda of telephone conversations, letters,

1 memos, anything like that?

2 MR. TENENBAUM: Just what you know from your
3 memory.

4 A. Well, based on since I didn't put it
5 down in Exhibit C-I, I don't think there were
6 any. There probably wasn't, no documents were
7 generated.

8 MR. TENENBAUM: He will have to look at his
9 files.

10 A. If your really concerned about it.
11 Yes.

12 BY MR. KARAGANIS:

13 Q. We are concerned about it.

14 MR. TENENBAUM: We will see if we can find
15 it.

16 It predates the RI/PS by a number of
17 years. Why are you concerned about it?

18 BY MR. KARAGANIS:

19 Q. That was in March '83 to 11-84; that is
20 an eighteen-month period, is it not?

21 A. That's correct.

22 Q. Did the --

23 A. And during that period of time, I think
24 we may have been in negotiations with defendants

1 and that might have affected --

2 MR. TENENBAUM: The partial consent decree
3 was being negotiated, perhaps.

4 A. -- that might have affected our
5 actions.

6 MR. TENENBAUM: During some of that period.
7 It was during the litigation in any
8 event. I don't know the exact date.

9 BY MR. KARAGANIS:

10 Q. Would you find the remedial action
11 master plan, at least the version of it that you
12 have included in the record, Mr. Boice.

13 A. Okay.

14 Q. Thank you.

15 You are familiar with the regulations
16 and guidance involving remedial activities under
17 the National Contingency Plan, are you not?

18 MR. TENENBAUM: As of what date?

19 MR. KARAGANIS: As of the time, let's take
20 1985.

21 A. I would probably have to review the
22 National Contingency Plan that was in effect at
23 that time.

24 Q. Okay.

1 Let's look at the remedial planning
2 field investigation team zone II contract, which
3 you referred to as the remedial action master
4 plan.

5 Is this document something that is
6 encompassed within the regulatory framework of
7 the National Contingency Plan?

8 MR. TENENBAUM: Objection. Calls for a
9 legal conclusion.

10 A. I know at that time it was part of the
11 Agency's procedures, and I'm almost sure if you
12 checked the regulations at that time it would be
13 consistent with the regulations and procedures
14 that were in effect at that time.

15 Q. Would that be the '82 plan?

16 A. I'm not sure.

17 Q. Let's take a look at this.

18 Are you familiar with the term initial
19 remedial measures?

20 A. Yes.

21 Q. Do you agree with the statement that is
22 contained at page 3-3 of the CH-2-M-Hill
23 document which says that the purpose of an
24 initial remedial measure or RI is to reduce

1 imminent hazards to public health and the
2 environment.

3 MR. TENENBAUM: How is that relevant to a
4 non-record issue?

5 MR. KARAGANIS: It is relevant to whether or
6 not there is an imminent and substantial
7 endangerment here which we have without
8 sufficient cause refused to address.

9 You are saying we acted without
10 sufficient cause. I say that you are wrong.

11 MR. TENENBAUM: As we indicated before, that
12 imminent substantial endangerment is a record
13 issue. So if there is nothing further, I will
14 have to instruct the witness not to answer,
15 pending the court's ruling on the motion for
16 protective order.

17 MR. KARAGANIS: You are instructing the
18 witness not to answer with regard to whether or
19 not he agrees with his contractor's
20 determination of what an interim remedial
21 measure is?

22 MR. TENENBAUM: Unless you can tell me how
23 it is relevant to some issue other than that.

24 MR. KARAGANIS: It is going to be relevant

1 to, among other things, whether costs were
2 undertaken, whether the defendants are acting in
3 bad faith, whether the EPA's conduct was
4 consistent with the National Contingency Plan.

5 MR. TENENBAUM: How is it relevant to
6 whether the defendants are acting in bad faith?

7 MR. KARAGANIS: If there is no imminent and
8 substantial endangerment and if it is a phony
9 issue, Mr. Tenenbaum, we are not acting in bad
10 faith.

11 And if you ignored your own
12 contractor's recommendations, which you did,
13 then the bad faith here is not of the
14 defendants; the bad faith may very well be of
15 the EPA.

16 MR. KEATING: We are not talking about the
17 ROD now. We are not talking about going behind
18 the administrative record. I understand that's
19 your issue,

20 MR. TENENBAUM: Imminent substantial
21 endangerment is a record issue.

22 MR. KEATING: You are going to ask us for
23 money more for bad faith. We say there is no
24 bad faith.

1 MR. KARAGANIS: You are asking us for
2 penalties. You have already stated on the
3 record you are asking for penalties and treble
4 damages.

5 MR. TENENBAUM: As we discussed during the
6 Standard T portion of this deposition, I am not
7 aware of an allegation in the complaint, correct
8 me if I am wrong, but I am not aware of an
9 allegation in the complaint that the defendants
10 acted in bad faith in the performance of the
11 RI/FS.

12 MR. KEATING: I am willing to stipulate with
13 you, counsel, you are not going to ask us for
14 treble damages.

15 MR. TENENBAUM: Treble damages. Is it your
16 position that in order to get treble damages you
17 have to prove bad faith?

18 MR. KARAGANIS: Is it your position that bad
19 faith is not an element of acting without
20 sufficient cause?

21 MR. TENENBAUM: I am not going to --

22 I have already discussed sufficient
23 cause more than I needed to. I don't see the
24 words bad faith in the statute on that.

1 MR. LUSTGARTEN: He has already stipulated
2 that he is not alleging bad faith, right?

3 MR. TENENBAUM: I have not stipulated to
4 that.

5 I have not been told how this question
6 has anything to do with whether the defendants
7 acted in bad faith.

8 MR. KARAGANIS: Because I take at this time
9 it is your position, whether it is your burden
10 or our burden on the sufficient cause issue,
11 that if we have acted in bad faith, we have not
12 acted with sufficient cause. And, therefore, we
13 have no defense for 106 penalties.

14 Isn't that right, Mr. Tenenbaum?

15 MR. TENENBAUM: I am not the witness here.

16 MR. KARAGANIS: But if we find that we have
17 acted in good faith and have acted with
18 sufficient cause.

19 MR. TENENBAUM: I don't see bad faith and
20 good faith. I don't see that in the statute.
21 We can look at the case law and see what it
22 says.

23 MR. KARAGANIS: The case law does reflect
24 the use of those terms, Mr. Tenenbaum, as you

1 well know.

2 MR. TENENBAUM: The case law. We will have
3 ample opportunity to brief the case law.

4 MR. KARAGANIS: Hold on.

5 MR. TENENBAUM: How does that have anything
6 to do with this?

7 MR. KARAGANIS: This document is relevant to
8 whether or not EPA sat on its posterior and
9 violated its own contractor's recommendations
10 with respect to whether or not any kind of
11 endangerment existed and what the contractor's
12 view of the endangerment was, and whether or not
13 EPA disagreed with it.

14 You have said, and you went through
15 long days of testimony about how our consultants
16 were acting in bad faith. This is your
17 consultant.

18 Your witness --

19 MR. TENENBAUM: We have not said anything
20 about bad faith.

21 A. You gave us the impression of.

22 MR. TENENBAUM: You insisted on asking this
23 witness' personal impression of whether or not
24 there was an impression bad faith. You insisted

1 on an answer.

2 MR. KARAGANIS: We got an answer. Now I am
3 following it up.

4 MR. TENENBAUM: How is this relevant to
5 that?

6 MR. KARAGANIS: Because the question is, if
7 you didn't follow, USEPA did not follow your on
8 consultant's recommendations, then it may be
9 grounds for suggesting that the term bad faith
10 is more properly pointed in another direction.

11 MR. TENENBAUM: So you are admitting it has
12 nothing to do with the issue that has been the
13 subject of this deposition?

14 MR. KARAGANIS: No. It has to do with the
15 subject of this deposition.

16 MR. TENENBAUM: You are saying that the --

17 MR. KARAGANIS: Do you want to take time to
18 read it and see how EPA didn't follow its
19 consultant's recommendations?

20 Take the time. Had you read it
21 earlier --

22 MR. TENENBAUM: I think it is nonsense, but
23 I will read it and see what you are talking
24 about.

1 MR. KEATING: This is the similar and the
2 same kind of question that I had asked during
3 the deposition. And we went through the same
4 kind of argument that how can you believe that
5 there is bad faith, when you are relying on
6 companies to tell you that there is no bad
7 faith.

8 During our deposition you asked us a
9 question about our bad faith, did we think we
10 were acting in bad faith.

11 MR. TENENBAUM: No, I didn't.

12 MR. KEATING: I said not if you people
13 didn't have any basis upon which to make a claim
14 for bad faith.

15 MR. TENENBAUM: I don't remember.

16 MR. KARAGANIS: Alan, take as much time as
17 you need to look at the document.

18 MR. TENENBAUM: I see.

19 We will have ample opportunity to brief
20 the sufficient cause issue. But, the sufficient
21 cause issue cannot be used to override the
22 provisions of CERCLA providing for
23 record-review.

24 MR. KARAGANIS: Do you want to drop the

1 penalty part of your complaint? Drop it. We
2 may be able to limit the issues of the case.

3 MR. KEATING: I will stipulate. I don't
4 care. You are wearing me down.

5 MR. TENENBAUM: Let's take a short break.

6 MR. KARAGANIS: All right.

7 (Whereupon a short recess was had.)

8 MR. TENENBAUM: I don't see any basis for
9 this.

10 But, subject to my objections, in terms
11 of expediting this, I will let the witness
12 answer, if he has knowledge of an answer to the
13 question. I don't even know what the question
14 is going be, but we will find out, this area of
15 questioning.

16 BY MR. KARAGANIS: .

17 Q. Mr. Boice, in your work as a remedial
18 project manager, have you ever heard the term
19 IRM or initial remedial measure?

20 A. Yes.

21 Q. Would you agree that its function is to
22 reduce imminent hazards to public health or the
23 environment?

24 MR. TENENBAUM: Object. Calls for a legal

1 conclusion.

2 A. I would say it was -- the purpose is to
3 reduce time, take measures that can be taken
4 fairly simply to reduce hazards, that may be
5 time critical.

6 BY MR. KARAGANIS:

7 Q. You mean hazards that must be addressed
8 in a relatively short period of time?

9 A. Yes.

10 That can be addressed through fairly
11 simple measures, compared to the expense of
12 long-term measures sometimes required for the
13 final remedial actions.

14 Q. Directing your attention to the master
15 plan, which is the remedial planning field
16 investigation team study, remedial action master
17 plan, November, '84. Would it be correct that
18 EPA's contractor found no imminent environmental
19 hazards at the site?

20 MR. TENENBAUM: Excuse me. You can read the
21 document as well as the witness can.

22 I think you have only read half of a
23 sentence in there. There's no basis for this
24 witness reading this any better than you can.

1 BY MR. KARAGANIS:

2 Q. Let's read the whole sentence.

3 "No imminent
4 environmental hazards were
5 identified at the site.
6 However, potential
7 environmental hazards will
8 be investigated in the
9 proposed remedial
10 investigation feasibility
11 study."

12 Based on what you know about the
13 history of the site and the conditions of the
14 site, was that an accurate statement as of the
15 time it was made in November 1984?

16 MR. TENENBAUM: Objection. The witness was
17 was not there in 1984. Also calls for a legal
18 conclusion and expert testimony.

19 BY MR. KARAGANIS:

20 Q. Go ahead.

21 MR. TENENBAUM: May be vague and ambiguous
22 as well.

23 MR. KARAGANIS: All right.

24 Did you get them all in?

1 A. I can only speculate on what exactly
2 they meant by no imminent environmental hazards
3 were identified at the site.

4 But, the fact that they said that they
5 need an investigation, or a remedial
6 investigation feasibility study needs to be
7 conducted at the site, indicates that they are
8 indicating that they need to evaluate the site
9 to fully quantify or evaluate the risk to human
10 health and environment at the site.

11 Q. Would it be fair to say that a layman
12 reading the sentence would conclude that the EPA
13 contractor, when it did the investigation
14 leading up to the master plan, found no imminent
15 environmental hazards at the time that they did
16 the study, but they recommended further study
17 that might discover such hazards?

18 MR. TENENBAUM: Same continuing objection.

19 A. I don't know what, how a layman would
20 interpret this.

21 BY MR. KARAGANIS:

22 Q. All right.

23 A. But I do know -- I am not sure, I don't
24 think they used the word imminent environmental

1 hazard properly as it is used there.

2 Q. You don't think your consultant did?

3 A. Yes.

4 Q. Okay.

5 Why didn't your consultant use the
6 terms imminent environmental hazard properly?

7 MR. TENENBAUM: Same objection.

8 Go ahead.

9 A. I don't know.

10 BY MR. KARAGANIS:

11 Q. You don't think they used it properly,
12 but you don't know why they didn't use it
13 properly; is that right?

14 A. That's correct.

15 Q. What is the basis for your thinking
16 they didn't use it properly?

17 A. The basis of my thinking, you want my
18 testimony on my thinking?

19 Q. You think they didn't use it properly.
20 What is the basis of your thought? If
21 you have no basis, say you have no basis.

22 A. Because, well, in a sense it is
23 inconsistent in that they say there's no
24 imminent environmental hazard identified at the

1 site. But, on the other hand, we need to do a
2 remedial investigation feasibility study.

3 Q. I take it they went out and did some
4 studies at the site, did they not?

5 A. They conducted a site visit. Yes.
6 They were supposed to have reviewed documents
7 related to the site.

8 Q. So based on what they did in site
9 investigation, documents at the site,
10 recognizing that further work needed to be done,
11 but based on all of their analyses to date, they
12 say they didn't find any imminent environmental
13 hazard, isn't that right?

14 MR. TENENBAUM: Same continuing objection.

15 A. That is basically what they said.

16 BY MR. KARAGANIS:

17 Q. All right.

18 Do you have any basis for disagreeing,
19 any factual basis for disagreeing with that
20 statement as of the time they made it?

21 MR. TENENBAUM: Same continuing objection.

22 A. Well, for one thing, there is the
23 endangerment assessment by David Homer that
24 indicated that -- concluded that there was an

1 imminent and substantial endangerment or may be
2 an imminent and substantial endangerment from
3 the site.

4 There is apparently some confusion as
5 to what an imminent environmental hazard is and
6 what an imminent and substantial endangerment
7 is.

8 BY MR. KARAGANIS:

9 Q. So you say there is an apparent
10 inconsistency between the December 22, 1983
11 Valdus Adamkus memorandum, enclosing the Homer
12 endangerment assessment, and the November 1984
13 CH-2-M-Hill document?

14 MR. TENENBAUM: Is your question whether he
15 said that or whether --

16 MR. KARAGANIS: Whether he believes it.

17 A. Apparently, yes.

18 Q. Okay.

19 One is right and one is wrong; is that
20 right?

21 MR. TENENBAUM: Objection.

22 Again that assumes that the terms are
23 being used synonymously. So, I have objected on
24 the grounds that they are vague and ambiguous.

1 MR. KARAGANIS: I will withdraw the
2 question.

3 Q. Now, let's talk about initial remedial
4 measures necessary to reduce the potential for
5 direct contact by the general public with
6 respect to hazardous soils, possibly hazardous
7 soils and leachate.

8 Would it be a fair statement that as of
9 November 1984, EPA's contractor was saying,
10 quote:

11 "The necessity for
12 implementation of this IRM
13 is presently unclear but
14 should become apparent as
15 the remedial investigation
16 feasibility study is
17 conducted."

18 Is that right?

19 A. That is what it says in the document,
20 yes.

21 Q. Would a fair understanding of that
22 statement be that it is not clear at this time
23 what we are about to recommend as interim
24 remedial measures are needed, but the need for

1 these interim remedial measures may become clear
2 as we pursue the RI/FS?

3 A. That sounds like a fair restatement of
4 the RAMP.

5 Q. By the RAMP, you are referring to the
6 CH-2-M-Hill study?

7 A. Yes.

8 Q. Now, in November 1984 they identify
9 what initial remedial measures would be needed
10 to address any imminent health hazard, do they
11 not?

12 A. No. This is a -- they are recommending
13 an initial remedial measure. They say will
14 reduce the potential for direct contact by the
15 general public.

16 Q. The purpose of an initial remedial
17 measure or IRM is, quote, "to reduce imminent
18 hazards to the public or the environment," isn't
19 that right?

20 MR. TENENBAUM: Are you asking whether it
21 says that?

22 BY MR. KARAGANIS:

23 Q. That's what the contractor said it was,
24 isn't that right?

1 A. That is what the contractor said in one
2 of the sentences, yes.

3 O. Isn't that what your understanding of
4 an IRM was under the EPA NCP program?

5 MR. TENENBAUM: Object. Calls for a legal
6 conclusion.

7 A. Well, yes. The purpose is to reduce
8 hazards to the public health.

9 BY MR. KARAGANIS:

10 O. All right.

11 The consultant was saying that while it
12 wasn't clear from the data they have looked at
13 whether these initial remedial measures were
14 necessary, if after later study they became
15 necessary, they identified what they would be;
16 isn't that right?

17 A. That's correct.

18 Q. All right.

19 And one of the measures that they talk
20 about is the installation of additional fencing
21 to prevent unauthorized entry to the site; is
22 that right?

23 A. That's correct.

24 Q. Okay. This is in the November 1984.

1 Between '84 and 1990, did EPA take any
2 action to install any additional fencing at the
3 site?

4 A. Yes.

5 Following the first round of sampling,
6 review of the first round of sampling results,
7 the Midco Steering Committee decided to install
8 a fence along the west side of Blaine Avenue,
9 which restricted access to perhaps 90 percent of
10 the site, which was west of Blaine Avenue.

11 Left maybe 10 percent of the site that
12 is east of the Blaine Avenue open to the public
13 and, of course, these recommendations, this RAMP
14 and these recommendations in the RAMP were
15 provided to the respondents and were available
16 to the respondents.

17 Q. But you had a recommendation from your
18 consultant, or EPA did as of November '84, to
19 install fencing around the site; isn't that
20 right?

21 A. It is a little unclear whether they are
22 recommending it at that time or whether it would
23 be after the remedial investigation feasibility
24 study is conducted.

1 Q. Okay.

2 So it is either that there is a
3 sufficient hazard in 1984 to require fencing or
4 there is an insufficient hazard in 1984, but
5 one, a hazard, requiring fencing may appear
6 later; is that right?

7 A. I think the hazard was there, they
8 didn't have the information.

9 Q. All right.

10 The hazard was there in 1984, but they
11 didn't have the information to justify fencing
12 in '84?

13 A. Well, what I said is the question --
14 previous question was whether the contractor was
15 recommending fencing the site at that time.

16 And what I am saying is it is unclear
17 based on the wording they used whether they were
18 actually recommending it to be done then or
19 after the remedial investigation feasibility
20 study was conducted.

21 Q. Did you have any results as to the
22 concentrations of hazardous substances either in
23 the soil or the groundwater as of December 1984?

24 A. Yes.

1 Q. Okay.

2 Did the soil and groundwater analyses
3 that you had as of that date establish that
4 there may be an imminent and substantial
5 endangerment to the public health?

6 MR. TENENBAUM: Object.

7 Unless you can tell me how that relates
8 to a non-record issue, I will have to instruct
9 the witness not to answer.

10 Does it?

11 MR. KARAGANIS: It relates to what
12 information these gentlemen who did the study,
13 these people who did the study in 1984 had.

14 MR. TENENBAUM: I am not following how this
15 relates to a non-record issue.

16 MR. KARAGANIS: I will try to come at it
17 another way.

18 Q. Mr. Boice, as to the eastern side of
19 Blaine Avenue, nothing has been done in that
20 five-year period; is that right?

21 A. Well, as I stated before, and I looked
22 in the index, there was an ATSDR report and they
23 recommended that the site be fenced.

24 Q. Where is that report, where is it in

1 the index?

2 A. It is it index.

3 Q. What is the date?

4 MR. TENENBAUM: Can you let him finish the
5 answer before we get to that?

6 MR. KARAGANIS: Sure.

7 A. And I told Dr. Ball that about that
8 recommendation.

9 He said he was going to bring it up to
10 the Midco Steering Committee.

11 Q. Okay.

12 Can you tell me where the ATSDR report
13 is in the recommendation?

14 A. It is in the record.

15 Q. What record?

16 A. Administrative record.

17 Q. What is the date on it, please?

18 A. June 19, 1987.

19 Q. Going back to the contractor's report
20 of November 1984, the RAMP, remedial action
21 master plan; would it be a fair statement that
22 the contractor was saying that as to public
23 health, it was not at the time clear that
24 interim remedial measures to prevent an imminent

1 public health hazard were necessary, but that if
2 data later showed them to be necessary, that the
3 following interim remedial actions would be
4 required?

5 MR. TENENBAUM: Same objections as earlier.

6 This witness is not in any better
7 position I don't think than you are in
8 interpreting what is said in the report.

9 He didn't write the report, did he?

10 MR. KARAGANIS: It was done for EPA.

11 MR. TENENBAUM: Are you asking him to say,
12 interpret what they said?

13 MR. KARAGANIS: No.

14 I am asking him to interpret and to
15 develop what it is.

16 If there was no imminent hazard to
17 public health requiring those measures at the
18 time of the report, they were saying that if
19 later data showed that imminent hazard to exist,
20 identifying what measures would be necessary to
21 abate the hazard.

22 MR. TENENBAUM: To abate the hazard, which
23 hazard, they had not yet found to exist?

24 MR. KARAGANIS: The imminent health hazard.

1 MR. TENENBAUM: I am really confused now.
2 Because, your question says that they did not
3 find this, but they thought, they did not find
4 any --

5 MR. KARAGANIS: It is not my contractor, Mr.
6 Tenenbaum, it is yours.

7 MR. TENENBAUM: No.

8 Your question says that the contractor
9 did not find an imminent hazard is what you said
10 in your question. But, that if one -- if a
11 hazard was found in the future, something should
12 be done.

13 And that is a very vague and ambiguous
14 question, because your premise is that they
15 haven't found something, but they are going to
16 find something in the future. So how can they
17 possibly say what needs to be done with respect
18 to something they haven't found yet?

19 MR. KARAGANIS: Mr. Tenenbaum, you haven't
20 stated an objection. But, I will try.

21 Q. Mr. Boice --

22 MR. TENENBAUM: It is vague and ambiguous,
23 objection.
24

1 BY MR. KARAGANIS:

2 Q. The contractor, CH-2-M-H, said that
3 they had identified interim or initial remedial
4 measures which would reduce the potential for
5 direct contact by the general public with
6 possibly hazardous soils and leachates, did they
7 not?

8 A. That is what it says, yes.

9 Q. All right.

10 And what were those measures?

11 MR. TENENBAUM: Initial remedial measure,
12 singular?

13 BY MR. KARAGANIS:

14 Q. Measure singular. I am sorry.

15 A. What was that measure?

16 MR. TENENBAUM: What was the initial
17 remedial measure?

18 MR. KARAGANIS: Yes.

19 MR. TENENBAUM: Okay.

20 A. Well, they say their recommendation
21 includes installation of additional fencing to
22 prevent unauthorized entry to the site.

23 Posting of warning signs on the site
24 fence and access gate and working with the local

1 law enforcement agencies to prevent unlawful
2 site entry.

3 BY MR. KARAGANIS:

4 Q. All right.

5 Do you agree that that would, such
6 measures would reduce any imminent hazard to
7 public health?

8 MR. TENENBAUM: I am afraid that it sounds
9 like you are asking for testimony on the
10 imminent substantial endangerment question,
11 unless you can tell how you are not.

12 MR. KARAGANIS: This report says there is a
13 measure, a three-part measure, which would
14 address any imminent hazard to public health.

15 MR. TENENBAUM: No, it doesn't say that at
16 all. It says this is an initial, a potential
17 initial remedial measure.

18 MR. KARAGANIS: Yes.

19 MR. TENENBAUM: You just said something a
20 little bit different.

21 MR. KARAGANIS: If you have an initial
22 remedial measure, a purpose of an initial
23 remedial measure is to reduce hazards to public
24 health. It says so right in there. The witness

1 has already testified as to that.

2 MR. TENENBAUM: You have stated it quite
3 differently in your question.

4 But, your question, is your question
5 that does the witness agree that the three
6 listed --

7 MR. KARAGANIS: Subparts to the measure.

8 MR. TENENBAUM: -- subparts to the potential
9 initial remedial measure would reduce the
10 potential for direct contact to the general
11 public?

12 MR. KARAGANIS: Yes, let's start with direct
13 contact.

14 MR. TENENBAUM: Well, I will allow him to
15 answer subject to my objections that you are
16 seeking expert testimony, opinion testimony and
17 a legal conclusion.

18 If you think you know the answer you
19 can answer, subject to the objection.

20 BY MR. KARAGANIS:

21 Q. Mr. Boice, no big secret.

22 Would posting of signs, putting up a
23 fence and using local law enforcement
24 authorities to restrict access reduce the

1 contact between the public and the hazardous
2 substances?

3 MR. TENENBAUM: Same objection.

4 A. Yes.

5 BY MR. KARAGANIS:

6 Q. All right.

7 Is that a measure that is used by EPA
8 or is that a measure that was used by EPA
9 historically, and is that currently used by EPA
10 to reduce health hazards from exposure to
11 hazardous substances?

12 MR. TENENBAUM: To reduce. Same continuing
13 objection.

14 A. I would say installation of a fence and
15 installing warning signs for sure.

16 As far as working with the local law
17 enforcement agencies, it has probably been done.
18 I don't remember offhand that it has. I don't
19 remember it having been done.

20 BY MR. KARAGANIS:

21 Q. But if you needed to take quick action,
22 the least you would do is a fence, wouldn't you?

23 MR. TENENBAUM: Same objection. Also
24 speculative, vague and ambiguous.

1 A. Probably.

2 BY MR. KARAGANIS:

3 Q. Now, where is this ATSDR letter,
4 66-19-87?

5 MR. BERMAN: Can we go off the record for a
6 second.

7 (Discussion had off the record.)

8 BY MR. KARAGANIS:

9 Q. Okay.

10 ATSDR, did we find it?

11 A. Yes. June 18, 1987.

12 (Whereupon a short recess was had.)

13 Q. Where does the ATSDR report recommend
14 fencing? I am now referring to the June 19, '87
15 ATSDR report.

16 A. On page 5 it says the area immediately
17 east of the site was found to be subject to
18 contamination. To the extent that it was also
19 covered with clay cap, it is appropriate that
20 access to it should also be restricted.

21 Also recommendation number 1. Continue
22 to restrict access to the site. In addition
23 restrict access to the area immediately east of
24 the site which has been capped to assure that

1 the cap in this area remains in tact.

2 Q. So ATSDR, would it be correct, was
3 saying that to protect the public health you had
4 to restrict access to the site?

5 MR. TENENBAUM: Objection.

6 A. They were recommending it. I am not
7 sure they said it is necessary.

8 BY MR. KARAGANIS:

9 Q. But they are recommending as a measure
10 to protect public health to restrict access to
11 the site; is that right?

12 A. Yes.

13 Q. It was your interpretation that the
14 method to restrict access was fencing, isn't
15 that right?

16 A. Yes.

17 Q. They themselves did not use the term
18 fencing; isn't that right?

19 A. That's correct.

20 Q. How did you communicate your
21 interpretation of restricting access to the
22 PRP's?

23 A. I called Roy Ball and I told him that
24 ATSDR had recommended. I probably used the word

1 fencing the portion of the site east of Blaine
2 Avenue.

3 Q. Well, by putting up a fence on the
4 western side of Blaine Avenue, that doesn't
5 restrict the access to the eastern, the portion
6 of the site east of Blaine Avenue, does it?

7 A. No.

8 Q. Okay.

9 So the PRP's did not fence east of
10 Blaine Avenue, did they?

11 A. No, they didn't.

12 Actually they did the western fencing
13 in 1986, not in 1987.

14 Q. So the western fencing was your
15 request, was your communication to Mr. Ball in
16 1986 then?

17 A. It would have been following this,
18 receipt of this memo. I am not sure when I
19 received it.

20 Q. So the fencing --

21 A. That I received in December '87.

22 MR. TENENBAUM: There may be more than one
23 communication here, so we don't get confused.

24

1 BY MR. KARAGANIS:

2 Q. The fencing that you say the PRP's put
3 up occurred prior to the June 1987 ATSDR report?

4 A. Yes.

5 Q. Was that as a result of a request by
6 you?

7 A. No, they did it on their own.

8 Q. And then as a result of the June 1987
9 ATSDR report, which recommended as a measure to
10 protect public health restricting access, you
11 called Roy Ball and suggested that the PRP's put
12 up fencing around the portion of the site east
13 of Blaine Avenue; is that right?

14 A. Probably, I don't remember the call
15 very much, or I might have just told him that
16 ATSDR HAD recommended putting a fence up east of
17 Blaine Avenue.

18 Q. Did you ask him to put a fence up east
19 of Blaine Avenue?

20 A. No. I'm not sure, but I don't think I
21 did. I just told him what ATSDR had
22 recommended.

23 Q. So, it would be correct that to the
24 best of your recollection you did not make a

1 request of Mr. Ball or the PRP's to put a fence
2 around the portion of the site east of Blaine
3 Avenue?

4 A. That's correct.

5 Q. And in 1987, you had the results of the
6 remedial investigation as well, did you not, the
7 RI?

8 A. Yes.

9 Q. So at the time of the ATSDR report, you
10 had both the results of the remedial
11 investigation and the ATSDR June '87 report, did
12 you not?

13 A. That's correct.

14 Q. Did you believe in 1987 having that
15 information, that an imminent hazard to the
16 public health was present?

17 MR. TENENBAUM: Objection, calls for expert
18 testimony and a legal conclusion and may be
19 seeking discovery into a record-review issue.

20 Unless you can tell me how it is
21 relevant to a non-record review issue, I will
22 have to instruct the witness not to answer.

23 MR. KARAGANIS: This witness has indicated
24 and the government's position is that we have

1 refused to take action to abate an imminent and
2 substantial endangerment to the public health.

3 The witness discussed the remedial
4 action master plan and said that the plan did
5 not find any imminent hazard to the public
6 health, but indicated that a study of the site
7 such as the remedial investigation might
8 discover such a hazard at which time a fence
9 would be required.

10 MR. TENENBAUM: That's your interpretation
11 of what the report said or what he said the
12 report said.

13 MR. KARAGANIS: That's what the testimony is
14 and that's what the report says, Alan.

15 MR. TENENBAUM: The testimony will speak for
16 itself, but go ahead.

17 MR. KARAGANIS: If after the remedial
18 investigation, an imminent hazard presented
19 itself, then by virtue of the EPA's own
20 contractor, common prudence would have said get
21 a fence up around the eastern side of the site.

22 Alternatively --

23 MR. TENENBAUM: But your PRP's, Mr. Ball had
24 the same reports and the same information that

1 he had.

2 MR. KARAGANIS: They decided not to put one
3 up because there was no imminent hazard.

4 Therefore, if there wasn't a
5 hazard, Mr. Tenenbaum, then it wouldn't have
6 been prudent to put up a fence.

7 If there wasn't a hazard on the east
8 side of Blaine, then there would be no basis for
9 putting up a fence.

10 And, therefore, both the PRP's action
11 in not putting up a fence and EPA's action in
12 not putting up a fence would have been totally
13 consistent with that set of facts.

14 MR. TENENBAUM: And how is that relevant to
15 a non-record issue?

16 MR. KARAGANIS: It is a record issue and a
17 non-record issue.

18 Number 1, there is an inconsistency in
19 EPA's actions, which is shown to be glaring in
20 the record and deserves further exploration.
21 Number 2, it goes to sufficient cause. And,
22 number 3, it goes to whether or not any of the
23 costs that we paid for once are now being sought
24 to be paid for again.

1 MR. TENENBAUM: Which costs are those?

2 MR. KARAGANIS: Among the cost that would be
3 involved is whether or not we paid -- we believe
4 we paid all costs necessary to address an
5 imminent and substantial endangerment back when
6 we signed the consent decree.

7 MR. TENENBAUM: I don't see where it says
8 that in the consent decree.

9 MR. KARAGANIS: We paid 5 million bucks,
10 didn't we, Jim?

11 MR. KEATING: \$5 million.

12 MR. TENENBAUM: I don't see anything in the
13 consent decree. You can show it to me if you
14 want, but I am not familiar with something in
15 the consent decree.

16 MR. KARAGANIS: About past cost?

17 MR. TENENBAUM: Saying you don't have to pay
18 for any costs, any costs relating to --

19 MR. KARAGANIS: Fix it once, don't fix it
20 twice.

21 MR. KEATING: That was the point this
22 morning. I don't want to step on Joe's toes.

23 MR. KARAGANIS: But he will anyway.

24 MR. KEATING: No.

1 MR. KARAGANIS: I am kidding. Go ahead.

2 MR. KEATING: I haven't objected to any of
3 your questions.

4 We paid \$5 million, Alan.

5 MR. TENENBAUM: Your confusion is that there
6 is many aspects to imminent substantial
7 endangerment.

8 One aspect is --

9 MR. KEATING: My confusion is where the hell
10 the fence is. We put up a fence, the damn thing
11 is gone.

12 MR. TENENBAUM: One aspect is addressed in
13 the removal action. That doesn't necessarily
14 say anything about all the other aspects of
15 imminent substantial endangerment.

16 MR. KEATING: We have a consent decree. \$5
17 million.

18 I am sitting here today and I am
19 listening to there is nothing there. We have
20 the same imminent and substantial endangerment
21 we had in 1983, and my \$5 million has been
22 pocketed.

23 MR. KARAGANIS: \$5 million was spent.

24 MR. TENENBAUM: I haven't heard anyone

1 saying that the situation is identical between
2 1980, whatever and the present.

3 MR. KEATING: How imminent and substantial
4 can you get?

5 MR. TENENBAUM: We will have ample
6 opportunity to --

7 MR. KARAGANIS: The reason nobody said it,
8 Alan, is that you instructed the witness not to
9 answer as to whether there's any difference in
10 conditions between '85 and '90.

11 MR. TENENBAUM: No.

12 MR. KARAGANIS: Yes, you did, Mr. Tenenbaum.

13 MR. TENENBAUM: I instructed the witness not
14 to answer questions about legal conclusions and
15 expert witness opinions and record
16 determinations as to imminent substantial
17 endangerment.

18 That is all I directed him not to
19 answer.

20 MR. KARAGANIS: The question is, is there
21 any difference with respect to public health
22 endangerment between 1985 and the present, after
23 \$5 million has been spent attempting to address
24 endangerment.

1 MR. TENENBAUM: When you asked questions in
2 this vein earlier, I asked you to try to explain
3 to me how it could be relevant to a non-record
4 issue.

5 MR. KARAGANIS: Mr. Keating went through the
6 same cost analysis as he did just now.

7 MR. KEATING: I wouldn't want to get too much
8 into it. I got \$5 million we spent. I don't
9 know exactly, you know, what happened to it.

10 We thought it was for alleviation of an
11 imminent and substantial endangerment. Putting
12 up fences and taking out the bad drums, taking
13 out the parts that were imminently and
14 substantially endangering the surrounding
15 community, because the ground was
16 contaminated --

17 MR. TENENBAUM: The source of your confusion
18 is that addressing one aspect of substantial
19 endangerment doesn't mean that every aspect is
20 addressed.

21 If you want, this is the first time I
22 have heard that you want to address a line of
23 questioning about what was accomplished by work
24 for which we are seeking costs.

1 Now, this witness may not be the person
2 who we would designate to testify as to removal
3 action. But, if you want to rephrase your
4 questions in terms of the costs that we are
5 seeking to recover in this action, then, of
6 course, I will allow this witness to answer, or
7 some other witness who is the appropriate one.

8 MR. KARAGANIS: All dollars that have been
9 spent to date have been spent to address alleged
10 public health hazards.

11 And if the public health hazard has
12 been abated by spending \$5 million, for you to
13 now come back and knock on our door and say
14 spend more after you have abated it --

15 MR. TENENBAUM: I told you that the reason
16 that part of -- or one aspect of a public health
17 hazard or an imminent substantial endangerment,
18 or any other phrase you want to come up with, I
19 am not rendering any opinion on what they mean
20 here, does not mean the entire problem is
21 solved.

22 MR. KEATING: My big fear here is that we
23 solve the problem as it is right now. Then we
24 come back in a few years and have another

1 imminent and substantial endangerment coming up.
2 I don't know how many degrees it comes in.

3 MR. TENENBAUM: That is the nature of the
4 hazardous waste problems and these things take
5 many years.

6 Now, I wish your clients would agree to
7 take care of the imminent and substantial
8 endangerment at the site. You are perfectly
9 correct that it may take many years for them to
10 do that.

11 MR. KEATING: We agreed last time to take
12 care of the imminent substantial endangerment.

13 MR. TENENBAUM: You agreed to pay for
14 various removal actions, but that is a
15 completely different point.

16 BY MR. KARAGANIS:

17 Q. Mr. Boice, directing your attention to
18 the June 19, 1987 ATSDR report.

19 Other than restricting access to the
20 site, did ATSDR recommend any additional
21 measures to protect the public health?

22 MR. TENENBAUM: So the record is clear, if
23 you want to rephrase any of your prior questions
24 to address cost issues, feel free to do so and

1 if this witness is the one who is knowledgeable,
2 he will be glad to testify.

3 A. It recommends that the integrity of the
4 temporary clay cover be -- or of the cap be
5 maintained.

6 BY MR. KARAGANIS:

7 Q. All right.

8 So restricting access and maintaining
9 the integrity of the existing clay cover; is
10 that right?

11 A. That's correct.

12 Q. All right.

13 Anything else?

14 A. Providing supplemental city water if
15 people's drinking water is contaminated.

16 Q. So alternative water supply if there is
17 evidence of contamination of drinking water; is
18 that right?

19 A. That's correct.

20 Q. All right.

21 Anything else?

22 A. In the final remedial action, if
23 contaminated soil is removed, they are
24 recommending that a flushing technique be used

1 to avoid suspension of particulate matter during
2 the removal.

3 Q. A flushing technique of the soils?

4 A. Yes.

5 Q. Is that a pump and flush technique?

6 A. I don't know what.

7 I think they are talking about if you
8 excavate it, somehow you need to control the
9 particulate matter by wetting it or flushing it.

10 Q. All right.

11 A. So it is clear here, what they are
12 talking about in the first three recommendations
13 are immediate measures or temporary measures?

14 Q. Measures to address immediate hazards;
15 isn't that right?

16 A. Or actual actions that could be taken
17 right now to reduce.

18 Q. To prevent someone from immediately
19 being subject to a health hazard, isn't that
20 right?

21 MR. TENENBAUM: You are using -- this is
22 really confusing.

23 The witness says something, actions
24 that could be taken right now or immediately.

1 Then you transpose that into actions that could
2 be immediate hazards.

3 You are talking about two different
4 things. It is not fair.

5 BY MR. KARAGANIS:

6 Q. Mr. Boice --

7 MR. TENENBAUM: It is not fair. The
8 question is not fair.

9 MR. KARAGANIS: You don't like the question,
10 Mr. Tenenbaum.

11 It is fair.

12 MR. TENENBAUM: No, it is not.

13 The witness used the word immediate in
14 one sentence. You attached the word immediate
15 in a completely different meaning, that's not
16 fair.

17 BY MR. KARAGANIS:

18 Q. Mr. Boice, I take it the reason you
19 take action immediately is to prevent an
20 immediate hazard or injury, isn't that correct?

21 A. That's correct.

22 Although, I should say that probably my
23 use of immediate was incorrect in that even
24 ATSDR recommendation is -- says, for example, it

1 would be appropriate to restrict access.

2 They don't make a determination that
3 there is an immediate hazard. Just recommending
4 measures that could be taken to reduce the
5 hazard, the potential for direct contact with
6 the waste.

7 Q. Would it be fair to say that ATSDR is
8 recommending these measures of restricting
9 access, alternative water supply, maintaining
10 the cap, as something that doesn't need to be
11 done immediately, but should be done when
12 appropriate?

13 MR. TENENBAUM: Same continuing objection.

14 A. I guess I am not sure what they meant,
15 but they are recommending that these measures be
16 taken.

17 BY MR. KARAGANIS:

18 Q. If there were a danger of an injury to
19 the public health within the next day, one would
20 take these prophylactic actions immediately,
21 would one not?

22 MR. TENENBAUM: Could you read that back? I
23 need it read back.

24 The questioner is making inverse,

1 converse statements in there, and it is
2 extremely unfair and is trying to lead the
3 witness.

4 MR. KARAGANIS: Please don't characterize my
5 questions as being unfair, Mr. Tenenbaum.

6 They are English language, intended to
7 identify with some precision terms that you are
8 deliberately leaving vague.

9 They are not unfair. If you don't
10 understand them, I will be glad to repeat the
11 question.

12 MR. TENENBAUM: I understand the question
13 perfectly well, but I understand why they are
14 worded the way they are, that is why they are
15 objectionable.

16 Can I have the last one read back,
17 please.

18 (The record was read.)

19 A. I imagine they would, yes.

20 BY MR. KARAGANIS:

21 Q. So would it be a fair statement that --
22 strike that.

23 Would it be a fair statement that
24 neither EPA's contractor, CH-2-M-Hill, in

1 November 1984, nor the ATSDR in June of 1987
2 found public health hazards requiring actions to
3 be taken immediately?

4 MR. TENENBAUM: Same continuing objection.

5 Do you want to look at both of them?

6 A. I am trying to think.

7 MR. TENENBAUM: It is also compound.

8 MR. KARAGANIS: Your objection is noted. I
9 don't believe it is.

10 Q. But, go ahead and answer the question,
11 Mr. Boice.

12 MR. TENENBAUM: You are asking him to
13 interpret two points at once, neither of which
14 he has indicated he wrote.

15 A. Yes.

16 I guess my understanding is that they
17 don't feel that it is an emergency or something
18 that has to be done immediately.

19 BY MR. KARAGANIS:

20 Q. All right.

21 That would be both?

22 A. But they are recommending it, at least
23 ATSDR is recommending that it be done.

24 Q. What they are recommending be done is

1 restricting access, which you interpreted to
2 mean putting up fencing, keeping the cap in
3 tact, and an alternate water supply; isn't that
4 right?

5 A. That's correct.

6 Q. Consistent with the ASTDR's
7 recommendation, has an alternative water supply
8 ever been made available to the residents of the
9 area?

10 A. No.

11 So far their water hasn't been
12 contaminated as far as we know by the Midco
13 sites.

14 Q. Okay.

15 So I take it ATSDR's recommendation was
16 to wait until there was some evidence of
17 contamination; is that right?

18 MR. TENENBAUM: Same continuing objection.

19 You can read what ATSDR said as well as
20 the witness can.

21 BY MR. KARAGANIS:

22 Q. Go ahead.

23 A. Yes.

24 As ATSDR says, it says if water is

1 needed for residential and drinking water
2 purposes.

3 From the RI, it appears that the
4 groundwater was moving slowly enough, so it
5 would take many years to reach existing drinking
6 water wells.

7 Q. How many years?

8 MR. KEATING: 95, wasn't it?

9 MR. KARAGANIS: Mr. Keating, I would like
10 the witness to answer how many years.

11 A. I don't know.

12 MR. KEATING: 95.

13 BY MR. KARAGANIS:

14 Q. So I take it based on the RI, and the
15 rate of movement of the water, there was no
16 immediate need to provide an alternative water
17 supply; is that right?

18 MR. TENENBAUM: I am going to have to object
19 at this point and begin to instruct the witness
20 not to answer.

21 You are now squarely into record issues
22 as far as I can tell, unless you can explain to
23 me how this relates to a non-record issue.

24 MR. KARAGANIS: It relates not only to

1 cost --

2 MR. TENENBAUM: How does it relate to cost?

3 MR. KARAGANIS: Because what has been
4 recommended as a measure of addressing public
5 health hazards here is, among other things, when
6 the hazard presents itself to provide an
7 alternative water supply.

8 MR. TENENBAUM: He said thus far there's no
9 costs that were sought for that.

10 MR. KARAGANIS: I want to be clear why there
11 are no costs that were sought for that.

12 MR. TENENBAUM: You want to take discovery
13 on costs to find out why you are not being asked
14 for costs?

15 MR. KARAGANIS: I want to know why we are
16 not being asked for costs on an alternative
17 water supply, for providing an alternative water
18 supply.

19 Mr. Tenenbaum, that is a lot cheaper
20 than asking us to spend \$40 million.

21 MR. TENENBAUM: I don't understand why one
22 would necessarily obviate the other. Can you
23 explain that?

24 MR. KARAGANIS: Because there wouldn't be a

1 hazard of any imminence at all with respect to
2 drinking water contact.

3 If you are providing an alternative
4 drinking water supply, you have eliminated the
5 hazard.

6 MR. TENENBAUM: I don't even know why you
7 assume the limited hazard you are talking about
8 is the only thing present.

9 But, how can this possibly be relevant
10 to costs, if there's no costs that have been
11 spent on it yet?

12 MR. KARAGANIS: As Mr. Keating so
13 eloquently put it, we spent \$5 million
14 addressing all the hazards that were known with
15 respect to any kind of imminent hazards.

16 We would have spent more --

17 MR. TENENBAUM: Why do you get that idea
18 that the \$5 million was to address all hazards
19 known?

20 MR. KARAGANIS: All the imminent hazards.
21 Yes.

22 MR. TENENBAUM: I am sure we will have ample
23 opportunity to --

24 MR. KEATING: Brief that.

1 MR. TENENBAUM: -- to brief the issue of
2 what it is you paid for.

3 BY MR. KARAGANIS:

4 Q. Mr. Boice --

5 MR. TENENBAUM: If you want to ask him about
6 something you paid for.

7 BY MR. KARAGANIS:

8 Q. Is it correct that you have not
9 requested either the PRP's or the RPA itself to
10 provide alternate water supply to the residents
11 of the area?

12 A. Me personally you mean?

13 Q. You as the remedial project manager.

14 A. Well, the procedure for doing that is
15 if there was a water supply threatened, then on
16 a short-term basis or on a time-critical basis,
17 we would refer that to our emergency program.

18 And they would take measures to provide
19 an alternate water supply that would protect
20 these people from exposure to the hazardous
21 chemicals.

22 If you are talking about the remedial
23 action, that was selected for the site, which
24 didn't include provision of an alternate water

1 supply, the reasons for that is documented in
2 the administrative -- in the record of decision.

3 MR. TENENBAUM: We don't want any testimony
4 on the basis for EPA's decision. That is not
5 subject to discovery.

6 So anything further you have in answer
7 to the question that --

8 BY MR. KARAGANIS:

9 Q. Where is that documented?

10 Without asking the contents of the
11 document, where is it documented?

12 A. In the record of decision.

13 Q. Where in the record of decision?

14 A. I will have to review it.

15 Q. Be my guest.

16 MR. TENENBAUM: Well, it is 5:30.

17 I don't know. I am not sure I am going
18 to let him answer that question anyway.

19 Why don't we break for the evening and
20 I will consider whether I am going to direct him
21 to answer or not.

22 If I am going to allow him to answer, I
23 will let him look at it.

24 MR. KARAGANIS: Let him look at his own ROD

1 over the evening.

2 MR. TENENBAUM: Right.

3 MR. KEATING: I would request for the record
4 that he look for my \$5 million. I want to know
5 what happened to it. What we did with it.

6

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Whereupon the deposition was
continued to August 3, 1990
at 9:00 o'clock a.m.)

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